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FOREWORD

BY

THE HON. CORDELL HULL

Secretary of State of the United States

THE deep and abiding interest of the United States in helping to rebuild a peaceful world out of the animosities, tensions and fears that hold sway at the present time, is expressed in many of its economic policies. But no phase of this economic rehabilitation is more vital than a restoration and expansion of foreign trade through the reestablishment of fair and friendly and cooperative trade relations among the nations.

To this end the United States is entering into trade pacts with various nations for the removal of economic barriers, and the promotion of mutual understanding and goodwill. They are intended to lay new foundations and to strengthen the trade channels through which commerce flows. Through conventions and treaties adopted at the Inter-American Conference for the Maintenance of Peace at Buenos Aires, now before the United States Senate for ratification, four of which deal with such matters as the maintenance, preservation and reestablishment of peace, the prevention of controversy, the use of good offices and mediation, the American Republics seek to protect and further trade relations so they need not be a cause for international misunderstandings.

In this broad scheme for the maintenance of peace and well-being among nations, the governments need the cooperation of business interests in these States. It is these business interests who write the contracts and make the shipments under trade pacts. It is they who are the carriers of goodwill through their commercial relations. It is they who establish trade agencies and have the intimate and constant contacts which promote international amity and friendship. It is they who maintain or mar the policy of equality of treatment as the basis of acceptable commercial policy approved at the Montevideo Conference.

It is for this reason that I welcomed the establishment of the Inter-American Commercial Arbitration Commission, authorized by the Seventh International Conference of American States.

This seems to constitute a realization by business men engaged in foreign trade of their full responsibility for maintaining peace and good neighborliness through their own business contracts and agencies.

The fact that business men in all of the American Republics have a unified peace organization of their own to dispose of their own commercial differences and that they endorse and use arbitration, not only to settle existing controversies, but provide for the settlement of future disputes is most gratifying as a supplement to official endeavors. That business organizations are willing to educate their associations in the maintenance of peace and goodwill through trade relations and to make their contracts the carriers of goodwill, constitutes one of the strong economic foundations which the United States is building for peace.

IDLE MACHINERY AT THE HAGUE

BY

FRANCES KELLOR

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IN 1899, not quite 40 years ago, the Permanent Court of Arbitration was established at The Hague. It was housed in a Peace Palace and marked the furthest outpost in the pacific settlement of international disputes. This Court was planned by the Peace Conference of 1899.

This Conference (and the later one of 1907) has provided the world with the finest machinery for the establishment of tribunals which it has yet seen. This machinery gives the parties a choice of procedures—each set forth in admirable detail—of mediation, inquiry, arbitration, or arbitration by summary procedure, as the parties may elect. An international bureau serves as a registry for the Court and conducts the administrative business relative to the proceeding. This Bureau is under the control of the Permanent Administrative Council, composed of the diplomatic representatives of the signatory States accredited to The Hague, and of the Netherlands Minister of Foreign Affairs who acts as President. The Council settles the rules of procedure and decides all questions of administration.[1] Panels of arbitrators are appointed in each signatory State.

Although this machinery remains unimpaired, is adequately financed and magnificently housed, with every facility for settling controversies, it has not been used since 1921. As to its future, the question naturally arises: In this period of economic strain, suspicion and misunderstanding, when disputes are like tinder boxes, is there not some great service which this Court can perform for the stabilization of commerce and for the expansion of goodwill through trade channels? Could not this Court supplement the network of international agencies now serving foreign commerce [2] by undertaking functions which they are not adapted to

[1] For a more detailed description of the Court and its differentiation from the Permanent Court of International Justice, see chapter on The Two Hague Courts in SECURITY AGAINST WAR, by Kellor, p. 491.

[2] For description of regional systems, see page 232.

perform? Is there not a changing economic order which calls for a new type of tribunal which commercial interests alone cannot supply and is there not need for the coordination of existing regional systems?

Of what nature are the controversies, arising out of foreign trade, that the Permanent Court of Arbitration might undertake to adjudicate in pursuit of its policy to maintain a general peace?

It would seem that no adequate facilities are available for the settlement of such controversies as the following: (a) Between a government body which enters into a private contract with nationals of another state, which controversies may assume international consequences unless promptly settled. (b) Between the members of a trade body in one country and those of a similar body in another country. Such organizations frequently have arbitration facilities and rules for their own nationals in their respective countries, but have no neutral arbitral machinery for the application of these facilities and rules to foreign trade. (c) Between individuals or corporations of different countries entering into trade contracts which contain arbitration agreements, but fail to provide rules for making them effective. (d) Between individuals or corporations of different countries who refuse to provide for or resort to arbitration, because of dissatisfaction with or lack of confidence in existing facilities for the settlement of foreign trade controversies. (e) Between nationals acting under trade pacts entered into by governments.

There is, however, another situation which appears to call for a type of tribunal which the Hague Court can supply. One of the most significant changes in foreign trade is the increasing control being exercised by governments; in some instances to the point of entering into competition with nationals or completely absorbing their capacities. Wherever the capitalist system with its free competition by nationals is impaired or abolished, the government conducts foreign trade and thus becomes a direct participant in the settlement of any disputes. Such a government is the U.S.S.R., which prefers that all disputes arising out of foreign trade to which its nationals are parties shall be arbitrated under the U.S.S.R. Chamber of Commerce Foreign Trade Arbitration Commission.[3] Since nationals of other States are generally unwilling to accept so exclusive a jurisdiction, the

[3] See page 317 for brief account of its organization.

pacific settlement of controversies languishes and the growth of trade relations is hampered.

The new type of tribunal for the settlement of foreign trade disputes, it would seem, must find a way to combine, in its establishment and administration, cooperation between business and governments which will command the confidence of both. Such cooperation should be of a nature to leave the parties free as to the submission to arbitration and the rules under which they will agree to arbitrate; to leave the arbitrators free as to findings and award; and to interest the governments in providing standards for procedure and administrative facilities.

A step in this direction has been taken in the western hemisphere in the setting up of the Inter-American Commercial Arbitration Commission, which maintains and administers tribunals in each Republic. Although administered by business men, representative of these Republics, the system was authorized by a resolution adopted by the Seventh International Conference of American States in December 1933, which also established minimum standards for law and procedure. A further resolution of the Governing Board of the Pan American Union put the system into operation and its policies and program are worked out in cooperation with the Pan American Union—a very real combination of business interests and the governments which approved of these resolutions.

As the Permanent Court of Arbitration was established by a conference of States through conventions to which they became signatory and its administration and policies, as pointed out, are in the hands of representatives of governments, it would seem that this Court lends itself admirably to an extension of its powers to the pacific settlement of commercial controversies between nationals of different countries or between nationals and governments.

It may be noted that the Court is already authorized to place its services at the disposal of nationals engaged in a controversy with governments. An illustration recently occurred in the Matter of the Decision in the Arbitration between the Radio Corporation of America and the National Government of the Republic of China, held at The Hague in 1936. In this instance, the Board of Arbitration was constituted under paragraph 10 of the Traffic Agreement, and the procedure was prescribed by the arbitrators. The Board of Arbitration held its meetings in the

Peace Palace and the International Bureau of the Court *gave the assistance of its organization for the functioning of the special jurisdiction of the arbitration.*[4]

It is not for the writer to suggest the method for extending the powers of the Permanent Court to the settlement of foreign trade controversies. Whether it shall be by amendment of the Convention or by a broad interpretation of the present powers of the Permanent Administrative Council or by the addition of a new section with new procedure for commercial controversies is for the Council itself to determine. What is of immediate importance is the recognition that unsettled trade controversies in the present status of nationalist economic conflict destroy goodwill and international understanding and later become a menace to peace. As only a small percentage of such controversies go immediately to arbitration, some international agency, open to governments and nationals alike, on terms to be defined, should grasp the opportunity to clear trade channels of disputes for the maintenance of general peace.

A court of arbitration engaged in the maintenance of a general peace has, however, a far greater responsibility than the settlement of existing controversies; it has the duty to foresee their origin and to eliminate the causes. This is the larger service of education and coordination. Here again no central agency occupies the field, nor can it do so. Of what nature are these services in order that foreign trade shall be more adequately protected from disputes and nationals from their consequences? Among them may be mentioned:

1. The establishment of certain standards for uniform legislation in states and for uniform rules of procedure, so foreign trade interests may be assured of the same facilities and practice wherever the arbitration is to be held and the award executed.[5] The diversity at present is so great that any attempts to promulgate an international law of arbitration must fail, in the absence of a preliminary agreement on basic standards. This

[4] See *American Journal of International Law*, July 1936, Vol. 80, No. 8, p. 523, f. for summary of decision.

[5] See article by H. Craandijk, p. 228, setting forth the basic standards agreed upon in the Treaty between The Netherlands and Belgium on the execution of awards; and the Proceedings of the Seventh International Conference of American States which established basic standards for law and procedure.

will necessitate making a detailed comparative study of these laws and procedures in order to formulate basic standards.[6]

2. The formulation of an international arbitration clause sufficiently flexible to permit of its administration under any rules the parties select. At present most clauses recommended for foreign trade contracts specify the rules, which are often too rigid for application in the different States. Parties should at all times be able to choose or amend the rules under which they will arbitrate.

3. The maintenance of a panel of arbitrators available at The Hague on call, representative of branches of foreign trade and of the professions, and from which panels the parties make their selection. This will necessitate a very considerable extension of the present panel. In New York City the daily calendar of The Arbitration Tribunal of the American Arbitration Association not infrequently lists from 5 to 10 cases and the New York City panel is approximately 1,500 men—not an excessive number when in each case lists of from 20 to 30 names are sent out from which parties make their selections.[7]

4. The maintenance of a central bureau of information from which parties in dispute can draw instantly knowledge concerning any arbitration law, leading decisions thereunder, administrative agencies, and practice (including rules) in any State wherein it is desired to hold an arbitration or execute an award. Such information is not to be had at present; nor does any existing agency possess the resources of a body of diplomats, such as constitute the Permanent Administrative Council, for obtaining and keeping up to date such information.

5. International research, to promote or undertake such studies as will contribute to the maintenance of general peace; as, for example, what effect changing forms of government and increasing control over foreign trade will have on international trade disputes and existing tribunals; or what forms of treaties or agreements are best adapted to the elimination of foreign trade controversies, as indicated by The Netherlands-Belgium Treaty

[6] See COMMERCIAL ARBITRATION IN THE AMERICAN REPUBLICS, a study of laws and practice which preceded and was used as the basis of the Resolution adopted by the Seventh International Conference of American States (1933), establishing standards and a system of arbitration.

[7] See Vol. 1, No. 1, p. 11, for description of method of selecting arbitrators.

already referred to. The maintenance of a central information bureau at The Hague would readily supply subjects for research.

No existing agency is acceptable to all foreign trade interests or to all governments for the purposes above enumerated. For, however valued may be their collaboration, existing agencies serve regional or special interests. As has been stated,[8] the regional systems are so constructed that the British system's first interest is the British Empire; the American system thinks in terms of American business interests; the Latin American and inter-American system serves the Americas; and the International Chamber system serves the states not already served by the regional systems. Furthermore, these systems differ among themselves as to philosophy, principles and practice. For example, the International Chamber provides for a conciliatory as well as arbitral proceeding, while the Anglo-American system does not; and the British system favors appeals and the submission of questions of law and legal rules of evidence, while the American system rejects them.

It would seem not inappropriate that the Permanent Administrative Council be invited to examine its idle machinery at The Hague, with a view to its adaptation to the settlement of international commercial controversies in the interest of the maintenance of a general peace for which it was created and is now maintained. In 1899, Americans foresaw the need and cooperated in building what still remains the most perfectly constructed machinery for establishing tribunals; in 1937 it is possible that Americans foresee the need for a new type of tribunal to meet the changing economic structure and will again cooperate in any plan to adapt the idle Hague machinery to that purpose.

[8] See p. 234, f.

CONFUCIUS ON LITIGATION

"I decide disputes for that is my duty; but the best thing would be to eliminate the causes for litigation."

PRACTICE ARBITRATIONS IN LONDON

BY

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ARBITRATORS are made, not born. The practice of arbitration in England, as evidenced by the increasing inclusion of an arbitration clause, particularly in commercial contracts, is becoming more and more a popular method of deciding disputes arising out of contractual relations between parties. It must be borne in mind at the outset that an arbitration under the Arbitration Acts of 1889 to 1934 is a judicial inquiry, though conducted before a tribunal other than one of the King's Courts. Hence it might occasion some surprise that very frequently arbitration proceedings are conducted in accordance with a procedure akin to that of the High Court, but before an arbitrator or arbitrators who are laymen and not lawyers.

It follows, therefore, that a lay arbitrator should be *au fait* to some considerable extent with High Court procedure and with rules of evidence, although it must be remembered that he usually has power to submit any question of law arising during the course of the proceedings, to the High Court in the form of a "case stated".

It would not be too much, therefore, to regard the arbitrators' job as highly specialized, hence the value of the existence in England of such a body as the Institute of Arbitrators (Incorporated), whose business is both to train arbitrators in procedure, etc., and advise the parties concerned as to the appointment of an arbitrator, particularly in disputes arising out of contracts containing an arbitration clause. But this is not by any means to say that lay arbitrators are not very frequently appointed by other learned institutions as, for instance, by the President of the Institution of Civil Engineers, or the President of the Royal Institute of British Architects, particularly in the case of submissions to arbitration of disputes under engineering or building contracts, for it is in connection with this class of dispute that so many of the ruling decisions have been given.

The Institute of Arbitrators, in accordance with its educational policy, adopts a procedure known as Practice Arbitrations to

which its members and members of other like bodies, who are likely to be concerned with arbitrations in the course of their practice, or even act as arbitrators themselves, are invited to attend. The actual subject matter which gives rise to the dispute is, in these meetings, of less importance than the procedure itself, and hence varies very considerably.

A convenient method of criticizing and assessing the value of these practice arbitrations will be to present an account of one of them recently held by the Institute of Arbitrators in London, to which were invited students of a chartered society. There was an attendance of some 150 and the close attention of the audience suggested considerable keenness. It was known that the cause of the dispute and the evidence to be adduced had been decided upon and arranged in some detail beforehand, as well as the award which the arbitrator delivered at the close of the proceedings.

In this particular instance a program containing the names of the arbitrator, the "counsel" for the plaintiff and defendant (neither of whom was a member of the Bar, though both possessed law degrees of a British University), the claimant and defendant (the latter under an assumed name that suggested the famous fictional case of *Bardell* v. *Pickwick*), and the witnesses, was handed to each person present. It was here that the reality of the meeting came first under suspicion, for some attempt had even been made to dress for the parts; for instance, the claimant, who was claiming damages for wrongful dismissal (it being alleged that he had shown communistic leanings), wore a very aggressive red tie, while the defendant, the managing director of the defendant company, made by no means an unsuccessful attempt to sustain the character of a choleric, "huntin' and fishin'" ex-army officer, used to discipline and intolerant of any opinion save his own, both of which characters appearing to be greatly appreciated by a fair proportion of the audience. That is not arbitration, however, but pure farce.

The program also contained the Points of Claim and Points of Defence, and it was to be regretted in this instance that the submission, or reference to arbitration, was not specifically included, which omission suggested a valuation rather than an arbitration, though no doubt it might be regarded as a useful mental exercise for those present to extract the essentials for themselves.

From the beginning, then, it might be suggested that the attempt that was impliedly being made to present the atmosphere

of a court of law was not entirely successful, a matter of regret, in the writer's opinion. Again, both "counsel" in their speeches, examination, cross-examination and re-examination of witnesses were prone to adopt tactics that again suggested those in the famous case quoted above. It was evident that both "counsel" were familiar with the rules of evidence, yet the arbitrator, who was not a lawyer himself, permitted a laxity that no British judge would allow. But it might be noted here that the ceremony of "swearing the witnesses" was dispensed with for reasons which the arbitrator explained at the time. British people still attach too much reverence and importance to the oath to wish to caricature it.

Apart from what has been said, the proceedings followed the form intended, though the "raising of a laugh" persisted. Eventually "counsel" for both sides made their speeches and submissions. It must be admitted that this part of the proceedings was on a much higher level than the former part, both "counsel", with the help of legal decisions, making out cases that would not have disgraced a practitioner in the courts.

Finally, the arbitrator delivered his award, in order to round off the proceedings. In doing so, and in order to stress the educational and informative value of the proceedings, he was at pains to explain that, in practice, he would have retired to his own room, home or office, as the case may be, with his notes, and carefully considered the various submissions made to him before delivering his award. And here one might remark that the arbitrator prefaced his award with the old-fashioned introduction which is now regarded as obsolete: "To all to whom these presents shall come, I, X..... Y....., of ..... send greeting". The days are gone for these ridiculous forms, of which "Know All Men by These Presents" is another. Lawyers, especially, accustomed to act as arbitrators, have repeatedly said they would never think of using them and that there is a real necessity for simple forms of award.

The award having been given, the arbitrator next took the opportunity of commenting upon certain material matters concerned with arbitration, such as the necessity for the award to be in writing in a real proceeding. The opportunity was also accorded him briefly to allude to further matters such as, e.g., the possibility, in the proper circumstances of an "interim award" being made, or one in the form of a "special case" for

the consideration of the Court, as well as for incidental matters such as the "execution", "publication", and "stamping" of the award.

Finally, in what time remained, an opportunity was given to anyone to ask relevant questions about the proceedings, the arbitrator first explaining that, as he was not a lawyer, he could not undertake to answer intricate legal questions! Whereby he showed his wisdom and not his ignorance.

It must be admitted, in conclusion, that on the whole, the proceedings had some definite educational value, and that the criticisms I have ventured to make were more than counterbalanced by the genuine and fairly successful efforts made by the promoters and the chief actors to familiarize those present at the meeting with the essentials and judicial nature of arbitration procedure.

But, naturally, the above "practice arbitration" did not go beyond what it was intended to reproduce, namely, the actual proceedings as far as this could be done by previous arrangement, at the actual hearing of the reference. It did not, and was not intended to call attention to the pitfalls and problems that attend the actual proceedings. One further thing it did do, namely, indirectly suggest the unfortunate results that sometimes follow on the arbitrator "giving reasons for his findings" in the award itself, hence affording an opportunity for the losing side to "shoot at him". In this case the arbitrator was wise to avoid that possible source of serious trouble.

One suggestion might be made here. Since there was a lay arbitrator in control, the opportunity might have been taken by someone to impress upon the audience the decision in *King* v. *Duveen* (1913, 2 K. B. 32) to the effect that where a specific question of *law* is expressly submitted to an arbitrator (lay or otherwise), his award cannot be set aside on the ground of being wrong in point of law: both sides act with their eyes open in appointing the arbitrator, and must take the consequences.

Granted, then, that the audience is disposed to regard these practice arbitrations as mainly educational and not merely recreative (as one would regard a "mock" trial), their educational value can be considerable, and hence it is hoped that the comedy side will always be kept in strict control. In practice there is little comedy in proceedings that might involve heavy payments to one side or the other.

Finally, presuming that a member of the audience had some knowledge of High Court procedure, even from textbooks only, and was able to follow the proceedings in the light of that knowledge, this practice arbitration can be said to have achieved, to a great extent, the aim of the promoters. But on the other hand, a person without that knowledge, who had not reached years of discretion, and the age at which one begins to form judgments, might easily be excused for paying greater attention to the unessentials than to the things that mattered.

In these practice arbitrations a great deal is left to the arbitrator, who should exercise his powers wisely by explaining, as the arbitration proceeds, the various points that have arisen and, by this means, give great and lasting profit to all those present at the hearing.

ELIHU ROOT ON THE ADMINISTRATION OF JUSTICE

"The law is made not for lawyers but for their clients and it ought to be administered so far as possible along the lines of laymen's understanding and mental processes. The best practice comes the nearest to what happens when two men agree to take a neighbor's decision in a dispute and go to him and tell him their stories and accept his judgment. Of course all practice cannot be as simple as that, but that is the standard to which we ought to try to conform rather than the method of acute, subtle, logical, final, discriminating, highly trained minds. It is that sort of thing which merchants seek when they try to get up committees of arbitration to decide their controversies without the intervention of lawyers. They are trying to get their questions settled in accordance with their instincts and habits of thought."

ARBITRATION UNDER THE NETHERLANDS-BELGIUM TREATY [1]

BY

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WE are living in a time when the importance of frontiers is felt much more strongly than was the case a few decades ago. Just as the merchant meets these frontiers everywhere and finds them a real impediment to the development of his trade, so do lawyers meet similar difficulties in proceedings against persons of another nationality. The latter must either submit the actions of their clients to a foreign judge and leave their interests in the hands of a correspondent, or choose the national forum and afterwards run the risk of securing enforcement in a foreign country.

If the parties provide for arbitration in their contract, the situation is somewhat improved, inasmuch as in most cases the contract expressly provides for a specific forum. This is especially true where the proceeding is to be conducted under the auspices of an established and recognized trade association. Nevertheless, there always remains the difficulty of enforcing the award against a party outside the jurisdiction where it was rendered.

As far as Holland is concerned, the procedure has become clarified as concerns enforcement of a foreign award. As the arbitration clause in a contract may be considered part of the agreement between the parties, it has been repeatedly held by the courts that the obligation to comply with the award is, in principle, not different from the ordinary obligation to fulfill all other terms of the contract. The action brought to enforce the award as rendered has been treated by the courts as an action brought on the contract.

Although in this way, in most cases, a practical result could be obtained, it has been far from satisfactory in that, after the

[1] Important also is the Geneva Protocol on the Execution of Foreign Awards of September 26, 1927, ratified by The Netherlands and Belgium. Subsequently a special law was enacted by The Netherlands on May 21, 1931, in order to adapt the Dutch law to the provisions of this International Treaty.

award was rendered, a new law suit had to be commenced, in order to give the award the status of a judgment.

Since 1929, the year in which a treaty between the two countries was concluded, so far as the relations between Holland and Belgium are concerned, there has been a valuable improvement with respect to the enforcement of awards.

The Treaty between these two countries regulates, among other things, the enforcement of awards. The underlying principle of this agreement is that a foreign award may be enforced in the same way as a domestic award. Dutch and Belgian awards, respectively, will only be recognized if the following conditions are complied with:

1. The award must not, by its contents, be contrary to the public policy or unlawful under the laws of the country in which it is enforced. There is, for instance, a provision in the Dutch Law that the arbitration tribunal shall always consist of an odd number of arbitrators so that an award given by a board of *two* arbitrators is invalid. Therefore, an award rendered in Belgium by two arbitrators, even though enforceable and valid under the Belgian Law, could not be enforced in Holland.[2]

2. The award must be enforceable under the *lex fori* of the country where it was rendered. While a decision of a law court becomes effective immediately when it is pronounced in open session, an award is never so pronounced and is sent to the parties by the arbitrators. Therefore, in order to put the award on the same footing as a judgment of a court of law, a copy of the award is to be filed with the court. Thereupon the President of the court has to grant the *exequatur*, which is evidence of the fact that in the court's opinion the award is now enforceable in the same way as is a judgment rendered by the court. It is always advisable to obtain such *exequatur* before attempting enforcement of the award in a foreign jurisdiction, since it will then assure the court in such foreign country that the award is valid under the *lex fori* of the place of its rendition.

3. The form of the award is also governed by the *lex fori* of the country where the arbitration took place. For this purpose

[2] This does not refer to majority awards, as Section Third, Art. 638 of the Dutch Code of Civil Procedure provides that " if the minority refuses to sign the award, the other arbitrators shall record that fact, and the award shall be of the same force and effect as if signed by all the arbitrators ". [Ed.]

a copy of the award, verified by the clerk of the court which grants the *exequatur*, must be submitted or the very copy that bears the *exequatur* of the President of that court may be presented to the courts of the other contracting country in order to enforce the award. A copy bearing merely the signatures of the arbitrators or of the Secretary of the Association under whose Rules the arbitration was conducted, is not sufficient under this provision of the Treaty.

4. The Treaty further provides that the parties must have been duly heard and must have been given an opportunity to present their evidence. However, where it can be shown that a party was duly notified of the hearing but refused to attend, an award rendered in the absence of such party is valid. The sending of a registered letter is as a rule considered sufficient notice of hearing.

When all of the above conditions have been complied with, the *exequatur* will be issued. It will be noted that all of these conditions apply to the formalities of the proceeding and do not concern the merits of the case. The decision on the merits remains entirely in the hands of the arbitrators. An appeal is provided against the decision granting the *exequatur* within a period of two weeks from the date of granting it.

Since 1929, the value and importance of the Treaty have been demonstrated in a considerable number of cases. An award rendered in accordance with the domestic law and not contrary to the law of the other contracting state now has an extraterritorial effect which may readily be expected to encourage the parties engaged in commercial business transactions to incorporate an arbitration clause in their contracts.

SYMPOSIUM

ON

ARBITRATION IN FOREIGN TRADE

FOREWORD

BY

JAMES A. FARRELL

Honorary Editor

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THE Secretary of State, Mr. Cordell Hull, in his Foreword, in the Foreign Trade Issue of THE JOURNAL, has very graciously complimented business men on the unified peace organization which they are building through trade channels and has expressed the government's need of their cooperation in the broad scheme of maintaining peace and well-being among nations.

For many centuries business men have had before them three courses of action: to let international trade disputes drift in the hope that time will come to their rescue; to resort to costly litigation, which is indeed costly in foreign trade transactions; or to provide for amicable settlement after disputes arise or to foresee the future and provide against them.

Today American business men lead the world in their practical organization of commercial peace. The unified peace organization to which Secretary Hull has referred, girdles the United States in a network covering 1,600 cities; it encompasses American Republics through a system that serves inter-American trade and which carries out Secretary Hull's idea of the cooperation between government and business.

It was the genius of American business men that envisioned and helped to build the Court of Arbitration of the International Chamber of Commerce. Long before this, at the instance of many States, the Permanent Court of Arbitration at The Hague was established in 1899 for the pacific settlement of international disputes; and it is again the vision of Americans that sees in this court the forerunner of a tribunal that serves business and government together.

In this issue, my distinguished colleagues in business, law and other professions describe in detail some of the efforts that constitute the structure of peace being built by business men and

its relation to government. Other distinguished leaders in American foreign trade and international affairs are serving with me as an Advisory Committee [1] for the foreign trade issue of THE JOURNAL.

I have said that the disorganization of trade relations is a challenge to the wisdom and experience of our time; that it is a challenge that calls for a revival of the spirit of international cooperation and recognition of the fact that economic factors continue to operate in restraint of policies that tend to limit the sum total of world trade.[2]

In what way can we better build goodwill and confidence, so essential to the revival of the spirit of international cooperation, than to clear trade routes of controversies and to provide for keeping them clear by making it impossible, impractical and uneconomic for disputes to remain as barriers to trade? It is a task to which Americans are devoting themselves and we are happy to have in this task the interest and assurance which Secretary Hull brings to our endeavors.

NETWORK OF INTERNATIONAL AGENCIES

BY

LOUIS K. COMSTOCK

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IT IS probable that arbitration was first used in foreign trade routes; for they, no less than modern commercial international tradeways, must have been beset by much the same difficulties of language, customs, usage, exchange and racial characteristics that so easily open the door to controversy in foreign trade transactions. When established law and legal regulations and machinery became increasingly complicated and harsh in their regulation of foreign trade, goodwill was often the only remaining narrow bridge over which arbitration was hurried to break the jam that held up both commodities and profits through some unforeseen dispute.

[1] The Committee comprises: Messrs. Herman G. Brock, James S. Carson, S. M. Crocker, John Kirby, R. A. May, John L. Merrill, C. M. Micou, F. W. Nichol, W. W. Nichols, Palmer E. Pierce, Bernhard K. Schaefer and Eugene P. Thomas.

[2] Address of Presiding Officer at World Trade Luncheon, held in New York, May 1937.

As foreign trade has become highly organized and intensely competitive, efforts have been made to have arbitration serve foreign trade more regularly and systematically and to relieve arbitration somewhat of its emergency character. In no other form of pacific settlement have men so eagerly sought legal enforcement for their arbitration agreements and awards as in commercial arbitration, on the ground that they were contracts. As a result, nearly every civilized country, having any volume of foreign trade, has enacted some kind of a law governing arbitral procedure and the enforcement of agreements and awards.

These various laws are so divergent and so often contradictory that it is not a simple thing for men of different nationalities, having headquarters remote from one another, to hold a successful arbitration. When arbitration is sought, the following problems present themselves to the parties: Can they obtain competent, impartial arbitrators; are the established rules of procedure acceptable to both of them; is the arbitration agreement legally enforceable in the respective countries of the parties; is the award legally enforceable in such countries; and will the proceeding be expeditious and economical?

So serious have been the obstacles that relief has been sought through international treaties and conventions; but without affecting greatly the relief sought.[1] By far the most effective method has been the establishment of private agencies supported by commercial interests. These take different forms: guilds, trade associations, chambers of commerce, public exchanges; and special agencies have been created for this purpose. The function of these agencies is everywhere the same: to aid business men in disposing of controversies by simplifying the proceeding under the various laws, or independently of them where good faith in observing agreements and awards is deemed sufficient. These agencies undertake, therefore, to implement arbitration laws, to reconcile their differences by regulations, to cover their inadequacies by rules of procedure and standard forms[2] (as of clauses), and to provide administrative facilities and services.

Without such agencies few men engaged in foreign trade would find it practical or expedient to resort to arbitration, be-

[1] *Protocol on Arbitration Clause*, 1923; *Convention on the Execution of Foreign Arbitral Awards*, 1927.

[2] The American Arbitration Association has found it necessary to devise 27 forms for implementing modern arbitration statutes in the United States.

cause, by themselves, neither the parties nor their lawyers possess, nor can they readily obtain, the knowledge to grapple with the difficulties presented in different countries by language, customs, distances, laws and decisions.

While many of these private agencies still operate independently in grooves of their own trade, the modern extension and organization of foreign trade has tended to localize them into what may be called regional systems, determined by geographical and political boundaries.[3] Each of these systems bears the imprint of its national or regional thought and policy, of its laws and of its economic theory and institutions. Each necessarily possesses characteristics which, while facilitating arbitration, also present barriers. We therefore find these systems differing on such fundamental practices as methods of selecting arbitrators, granting of appeals, reference of questions of law during the proceedings, emphasis to be placed on rules of evidence, and whether conciliation and arbitration belong in the same rules.

The regional systems which comprise the network here being described are chiefly four: the British, the American, the Latin and inter-American and that of the International Chamber of Commerce.

Of these the oldest and most active is the British system, which serves primarily the British Empire. Founded on English common law, its practice established by a long line of decisions and growing out of a long conflict between merchants and judges, its agencies comprise chiefly chambers of commerce and public exchanges.

In the first group is the London Chamber of Commerce and the Federation of Chambers of Commerce of the British Empire. The London Chamber maintains a Court of Arbitration which is a model for all other Chamber tribunals. It establishes standards in rules and clauses and in administration for all other chambers to emulate and it is a powerful factor in liberalizing the arbitration law and in keeping it abreast of the needs of commerce.[4]

One of the functions of the Federation is to promulgate these standards to its member Chambers throughout the Empire, to

[3] Such, for instance, is that of the cotton industry, described by Dr. Murchison, p. 256.

[4] For more complete description, see p. 319.

induce them to adopt the London Chamber Rules of Procedure insofar as these are applicable, and to interest them in urging legislation in accord with English law.[5]

Operating independently, but nevertheless as a component part of the British system, are the public exchanges. The volume of arbitral business conducted by them illustrates their importance to international trade, for they have what amounts practically to a monopoly of the settlement of these controversies.[6] From figures recently compiled, it appears that the Corn Trade Association settles approximately 2,000 cases per annum; the Incorporated Oil Seed Association, 20,600 cases over a period of 3½ years; the London Cattle Food Trade Association, 430 cases in 1½ years; the London Copra Association, 980 cases in 1½ years; the London Oil and Tallow Association, 120 cases in 1½ years; the Hide Shippers and Agents Association, 700 cases in 7 years; the London Jute Association, 45 cases per annum; the Seed Oil and Cake Trade Association and Liverpool Produce Association, 1,681 cases in 3 years, and the Liverpool Corn Trade Association, 851 cases in 3 years.[7] It may be truly said that these exchanges keep the trade routes clear of acute controversies and rarely do shippers take these disputes to court.[8]

The fundamental legal principles underlying the British system are that arbitrations are based on respect for law; that only matters that can be made the subject of a civil action are arbitrable; that just decisions based on evidence, and not compromise, prevail; that agreements to arbitrate present and future disputes are legally enforceable; that legal questions may be referred to the court by either party during the proceedings; that certain rules of evidence are to be followed in the proceeding; and that arbitrators have sole jurisdiction over the merits of the controversy.

[5] A report issued by the Federation in 1927 indicated the extent to which these activities were succeeding.

[6] With what effectiveness these settlements are made appears in Mr. Fraser's article, p. 250.

[7] *Kime's International Law Directory*, 1937—R. S. Fraser.

[8] Other exchanges include: the London Iron and Steel Exchange; the London Metal Exchange; the London Rice Brokers Association; the London Egg Exchange; the Manila Hemp Association; the Coffee Trade Association; the London Rubber Exchange; the London Fruit Exchange; and the London Fur Trade Association.

The American system, which serves primarily foreign trade interests in the United States, is more limited in its scope by the fact that London exchanges absorb so large a part of foreign trade controversies;[9] and that in New York a considerable number of foreign commercial agencies pre-empt this field. Also, chambers of commerce in the United States, having somewhat different functions from British Chambers, and being more concerned with local affairs, are not active in this field.[10] The same statement applies to the many foreign trade clubs and organizations.

The organization and administration of the American system has therefore passed to a central agency, the American Arbitration Association, established and maintained by public and commercial interests. Its functions are similar to those of the London Chamber and the British Federation. It maintains a Tribunal which operates under a *Code of Arbitration Practice and Procedure,* containing uniform rules, clauses and forms applicable to foreign trade arbitrations. It maintains national and international panels.

The Association carries on activities similar to those of the Federation, in the maintenance and dissemination of standards for other organizations, the improvement of arbitration law and other educational work.[11]

To many of the trade associations and commercial agencies the Association holds an advisory relation, in the standardizing of the rules, in acting as a clearing house for information, in performing expert services requiring a knowledge of arbitration law and court decisions. In return they support legislative proposals and general educational work and by reason of this cooperation are integrated in the American system.

[9] An instance in which this field has been divided is the fur trade. In 1927 the Fur Merchants Association of New York revised its rules and established new rules and many of the determinations of disputes, in which Americans were parties, passed to the New York Association on the guarantee that the American Arbitration Association, as a neutral agency, would supervise its arbitrations.

[10] An exception is to be noted in the Chamber of Commerce of the State of New York, which was the pioneer in developing arbitration in the foreign trade field and is still active.

[11] For fuller description of the American system, see Vol. 1, No. 1, p. 6, and Vol. 1, No. 2, p. 121.

The fundamental legal principles underlying the American system, being derived from the English common law, are much the same as those of the British system, except that they lay less emphasis on legal rules of evidence, do not ordinarily permit reference of questions of law; and are more limited in their attitude toward the arbitration of future disputes.

A third system comprises two separate activities: the arbitrations carried on by individual Latin American nationals with the nationals of countries in other hemispheres. These activities are under the direction of trade and commercial organizations in each Latin American State in cooperation with other commercial agencies as, for example, the London Exchanges or English Chambers of Commerce located in centers that are interested in a predominating commodity—as Manchester and Liverpool for cotton.

The coordination of arbitration activities into a system operating between American States, including the United States, is, however, being developed through government channels, with the active cooperation of the nationals of these states. The task of reconciling practices between nationals of Latin American States operating under Napoleonic theories of law is not so great as that of reconciling practices between these nationals and those of the United States, operating under Anglo-Saxon theories of law.

For 15 years these difficulties were discussed in international conferences of the American States; but it remained for the Seventh International Conference of American States to institute a system giving life to these discussions. The agency through which this system functions is the Inter-American Commercial Arbitration Commission, organized under the auspices of the Pan American Union by business and professional men, representing the 21 American Republics. The Commission is organizing local administrative committees and panels of arbitrators in each Republic, and has uniform arbitration rules which incorporate certain essential standards of arbitration, officially approved by the Seventh International Conference. These standards are also intended eventually to be incorporated in the prevailing arbitration laws and one of the most important duties of the local committees of the Commission is to harmonize the existing arbitration laws with these standards.

A quite different system was established in 1923 by the International Chamber of Commerce in its Court of Arbitration.[12] Since the Chamber has representatives from most States and a cooperating branch committee in each one of them, it was believed that the establishment of a Court would offer a universal system which would be generally used by the nationals of all States. It was thought, also, that it would absorb some of the functions of existing agencies or, at least, act as a coordinating agency.

That this dream has not been wholly realized is due to inherent difficulties in the situation over which the Chamber has had no control, such as differences in language, custom and nationalist attitudes, laws and procedures.[13] Existing agencies have resisted absorption. For example, the agencies of the British Empire continue to serve the Empire under British Law and the exchanges continue to enjoy their established prerogatives. Americans' distrust of European institutions, even though founded by themselves, has led them to establish their own system at home and to seek the cooperation of other American States in extending it to the other Republics.

Despite these difficulties, the use of the Court of Arbitration has grown steadily and it serves many countries not reached by regional agencies. An attempt to extend the facilities of the Chamber and to bridge these differences is being made through the formulation of an International Law on Arbitration.[14]

A very considerable amount of foreign trade controversies are not arbitrated in any of these systems. These are conducted by the so-called independent trade organizations that have their own type of clause and that make their own rules or that fail to provide any rules of procedure. These would not, for example, be able to use the facilities of the British system or of the Latin American system or the Court of the International Chamber without subscribing to their procedures. They would be able to use the American and inter-American systems, for these provide

[12] See Vol. 1, No. 1, p. 13, for account of its activities.

[13] In my address before the meeting of the International Chamber of Commerce in 1931 I pointed out many of the procedural reasons why Americans do not make extensive use of the Court of the International Chamber of Commerce.

[14] Being discussed at the Congress of the International Chamber of Commerce, meeting in Berlin in 1937, and to be the subject of an article in the October issue of THE JOURNAL.

for arbitration under rules of other organizations or those made by the parties. Were the laws more nearly identical and the procedure more unified, a contest over the choice of the tribunal would not arise to preclude or defeat arbitration.

So we find many trade groups in the United States establishing their own facilities and not greatly interested in larger questions of protecting foreign trade generally from controversy as are the regional systems. Examples are the Dried Fruit Association, the American Spice Trade Association, the Coffee Exchange and other organizations interested in a special line of commodities.

It is apparent that, under these different systems, vastly complicated by independent, uncoordinated undertakings, the settlement of foreign trade controversies is greatly hampered. For example, until the inter-American system was formed, Americans were reluctant to proceed under the unfamiliar laws in Latin American States and Latin Americans were just as distrustful of the 48 different state laws obtaining in the United States.

It is equally apparent that not only would foreign trade benefit but that the maintenance of a general peace would be greatly advanced through a coordination of these systems and independent agencies, thus enabling them to move forward together in building a strong economic foundation of goodwill and understanding between the industries which they now serve.

AMERICAN FOREIGN TRADE RELATIONS

BY

EUGENE P. THOMAS

President, National Foreign Trade Council, Inc.

ARBITRATION as an aid to foreign trade has long occupied the serious attention of American business concerns having dealings with other countries. For a number of years the necessity of formulating practical plans for a system of arbitration as an alternative to court proceedings has been advocated by the National Foreign Trade Council. At its Eighth National Foreign Trade Convention, held at Cleveland, Ohio, May 4-7, 1921, the following recommendation was adopted as part of the Final Declaration of the Convention:

> Throughout the world the stress of readjustment has been attended by deplorable violations of the sanctity of contracts, emphasizing the

absence of adequate international machinery for the enforcement of awards of commercial arbitration. This deficiency should be promptly remedied. In many instances all parties affected by breaches of contracts sincerely believe themselves in the right, as numerous commodities in foreign trade are not standardized. Standardization of the grain, cotton, iron ore and other staple trades has protected them from the defaults so numerous with merchandise to which standardization should, so far as practicable, be applied. Business interests should cooperate with the United States Government to this end.

Through the initiative of the National Foreign Trade Council standard definitions of shipping terms (F.O.B., C.I.F., etc.) in foreign trade have been generally adopted in the United States. The concurrence therein of commercial organizations abroad should be sought by the Council. Revision and uniformity of ocean bills of lading are greatly to be desired now that the hazards of war are removed.

We commend the efforts of the American Bankers Association and other organizations to adopt uniform standards of Letters of Credit.

As a direct contribution to the arbitration movement, the National Foreign Trade Council had already formulated proposals, referred to above, for standardization of definitions of shipping terms, a million copies of which were distributed throughout the world. These were in the form of *American Foreign Trade Definitions,* and were submitted to and adopted by a conference held at India House, New York, on December 16, 1919. The conference was comprised of representatives of the following organizations: National Foreign Trade Council, Chamber of Commerce of the United States, National Association of Manufacturers, American Manufacturers' Export Association (now the National Foreign Trade Association), Philadelphia Commercial Museum, American Exporters' and Importers' Association, Chamber of Commerce of the State of New York, New York Produce Exchange and The Merchants' Association of New York.

While advocating abandonment of abbreviations of trade definitions, the conference, recognizing the difficulty of obtaining general acceptance of this recommendation, proceeded to simplify and standardize American practice, by adoption of definitions to the exclusion of all other forms of abbreviation. These provide a basis for price quotations in normal situations affecting trade and shipping terms. *American Foreign Trade Definitions,* as adopted by the conference in 1919, is a standard publication of the National Foreign Trade Council and in constant demand by export manufacturers and shippers.

As a constructive aid to foreign trade and the avoidance of disputes that lead to court action, this simplification and standardization of trade and shipping terms has been of enormous benefit to the foreign trader.

The founding of the American Arbitration Association has had the active support of the National Foreign Trade Council, which has assisted in its preparation of arbitration panels for the hearing of claims arising out of trade disputes. The American-Japanese Trade Council and the American-Chinese Trade Council, under the auspices of the National Foreign Trade Council, are also represented on the arbitration panels.

The National Foreign Trade Council was formed in 1914, prior to the outbreak of the war. Mr. James A. Farrell was elected then to be its chairman, and has been re-elected each succeeding year as one who in a peculiar degree has justified the title assigned to him—father of the foreign trade movement in the United States. Each year the Council holds a Convention in one of the leading cities, at which all matters concerning the interests of exporters, importers and allied agencies are freely discussed by delegates that assemble from all parts of the country.

While the activities of the Council are not directly concerned with arbitration proceedings, it cooperates through its chairman and members in assisting the Arbitration Association in the hearing of claims that come before it for adjudication.

The purposes of the Council were defined at its inauguration in the following resolution:

> WHEREAS, The development of the United States makes it essential to the best interest of the Nation that the Government and the industrial, commercial, transportation and financial interests should cooperate in an endeavor to extend our foreign trade; and
>
> WHEREAS, This Convention, having been called to consider the means by which this purpose may best be served, deems it desirable that some organization be effected which shall endeavor to coordinate the foreign trade activities of the Nation; therefore, be it
>
> *Resolved*, That the delegates assembled at this, the first National Foreign Trade Convention, approve the purposes for which this Convention has been called and pledge themselves to use their best efforts to secure the cooperation of the interests which they represent in a national effort to extend our foreign trade; be it
>
> *Resolved Further*, That the President of the Convention appoint a Council to be nationally representative in character and to be composed

of thirty members to be known as " The National Foreign Trade Council "; and, be it

Resolved Further, That such National Foreign Trade Council is hereby authorized to call a second National Foreign Trade Convention at such time and place as it may deem advisable; and, be it

Resolved Further, That this Convention authorize the Chairman of such Council to request the Chamber of Commerce of the United States of America to appoint a Committee which shall meet with the National Foreign Trade Council, or a sub-committee appointed thereby, to discuss a plan by which the National Foreign Trade Council may collaborate with the Chamber of Commerce of the United States of America.

This particular function of the Council, that of coordinating the foreign trade promotion activities of the nation, has been exercised chiefly in the sphere of legislation affecting the foreign trade interests of the nation. Insofar as it has been successful in advancing the cause of arbitration, it has been with a view to the coordination of foreign trade interests behind the American Arbitration Association, which now is carrying out so successfully the ideas of foreign traders presented in previous years at meetings of the Council.

The membership of the Council and affiliated Association comprises manufacturers, merchants, exporters and importers, railroad and steamship men, bankers, insurance underwriters, representatives of agricultural interests and of educational institutions—nation-wide in its membership and activities. Its efforts have proved most effective in securing the cooperation of the Departments of the Government and of the industrial, commercial, transportation and financial interests of the country in the carrying out of policies designed to extend our foreign commerce.

In harmony with the special work of the American Arbitration Association is the constant effort of the Council to compose commercial differences with other nations. In 1935 the Council was responsible for the organization of the American Economic Mission to the Far East, of which former Governor-General W. Cameron Forbes was chairman. This Mission visited Japan, China and the Philippines. In return, the Japan Economic Federation of Tokyo recently sent a similar Mission to the United States, of which Mr. Chokyuro Kadono was chairman, and which visited principal cities throughout the country, holding conferences with American business men on the means to be adopted in furtherance of increased trade between the two countries. As

a result of these Missions a better understanding has been established and material gains secured by the "gentleman's agreements" affecting imports into the Philippines and the United States of certain Japanese cotton textile goods. The Japanese Mission held a meeting with the Directors of the American Arbitration Association at their offices.

Of similar service as a moderating influence where trade disputes arise was the formation last year of the South African Reciprocal Trade Committee, under the auspices of the Council. Difficulties had arisen in connection with the importation into the United States of South African grapes. This was wrongly interpreted in South Africa as due to discrimination against South African imports. The import regulations of this country, applying to imports coming under our sanitary laws, are the same in all cases where there is fear of entry of the Mediterranean fly pest. After months of constant effort, and due to the cooperation of the Departments of State and Agriculture, it was found possible to permit entry of South African and other grapes after refrigeration at a higher temperature than previously. Government experts were sent to South Africa to pass upon the refrigeration methods employed by shippers, with the result that all tension between the two countries, which had given rise in the early stages to threats of a boycott of American imports into South Africa, was removed and the first shipment of South African grapes made possible a few months ago.

The Council's activities have been greatly extended as a result, in recent years, of the world depression and the many intricate problems of an exceptional nature that have arisen in consequence. Financial stringency in many countries, and the adoption of exchange controls, had frozen millions of American credits abroad. It was decided by the Council that the task of freeing these credits was one particularly in line with the purposes of the organization. After months of negotiations between the Council and its associates and the Governments of Brazil and Argentina, agreements were reached in 1933 by which, in the case of Brazil, approximately $14,000,000 of American blocked balances were repatriated, and in the case of Argentina, about $23,500,000. In February 1936, another agreement was made between the Council and the Government and Bank of Brazil for the refunding of accumulated American balances amounting to $30,000,000.

The wide range of the Council's work on behalf of the nation's foreign trade is not as fully known as it should be. For nearly a quarter of a century it has carried on unremittingly the work for which it was established in 1914 and has succeeded, to an extent little dreamed of by its founders, in creating throughout the country a sense of national consciousness in respect to the national interest in foreign trade. The Council carefully reviews legislation that may prove prejudicial to the national interest in foreign commerce and is represented at hearings at Washington where controversial measures of this kind are before Congress. It has given strong support to the Sanitary Convention between the United States and Argentina, which Congress has failed so far to ratify. This delay in removing discriminatory import regulations against the meat products of the Argentine has proved costly to American exporters, who in turn have been discriminated against by Argentina in the matter of exchange and trade.

The National Foreign Trade Council will continue to render support to the American Arbitration Association for the valuable work it has accomplished on behalf of American foreign trade.

GOODWILL TAKES TO THE AIR

BY

VICTOR WEYBRIGHT

Managing Editor, Survey Graphic

IN less than 10 years the routes of Pan American Airways have grown from 110 miles to 40,869 miles, comprehending the greatest international mileage of any air transport line in the world. On March 1 of this year its regular service connected 40 countries and colonies; it had already carried nearly three-quarters of a million passengers; it owned 138 ground radio control stations; it had 135 airliners in operation; and, most remarkable of all, it had maintained 99.82 per cent regularity of schedule by Post Office rating.

Although the importance of international air transport cannot be judged by figures alone, the figures are impressive. In contrast to all other foreign commercial air routes, the Flying Clipper routes were developed without governmental assistance, other than mail contracts on a payment-for-services-rendered

basis. And, compared with most other lines, Pan American Airways, as the only United States representative in the foreign field, was remarkably cosmopolitan. The Dutch KLM line, for example, serves primarily as a link between Holland and her colonies in the East. Britain's Imperial Airways is likewise primarily a thread of political empire. The Italian air lanes to Africa do not branch into a general network. And the USSR system, like our own domestic transport systems, consists primarily of internal development.

In South America the Flying Clipper Ships compete, of course, with the German and French state-subsidized lines; but they also connect with numerous associated lines and, moreover, span the Caribbean as well as the continent. And, from California, the giant Clippers in the Hawaiian and China trade provide an extraordinary service to the Orient. The routes to Australasia and New Zealand are surveyed; the conquest of the Atlantic is already as far as Bermuda on regular scheduled flights. The great ocean-going flying boats now building for Pan American Airways—to be two and three times the size of the present Clippers and their sealed stratosphere planes speedier and freer from weather hazards than anything we have yet seen for long distance overland service—will reduce the world to a very small place indeed.

The importance of this aerial development, and especially of the well-established routes between the United States and Latin America, cannot be described in terms of mail, merchandise and passengers carried, without noting that the real cargo of most foreign air transport consists of ideas—of ideas borne by men or letters, of ideas demonstrated in machinery and style merchandise. The Clipper Ships are not a mere projection of their namesakes, the famed old sailing vessels that once before in history carried American trade to and from the four corners of the world by way of stormy Cape Horn. Today's Clippers do not even compete with the steamer lines that, perforce, parallel the airway routes. In the West Indies and in Latin America, as well as across the Pacific, they supplement the steamer in unprecedented ways. They make it possible for a man in Rio de Janeiro to see an American newsreel the same week in which it is shown in the United States, and for his wife to select a stylish frock the very day that it is introduced in New York. Neither cables nor wireless can so quicken commerce as this display of

actual things. New patterns of understanding and of competition are emerging.

. The American genius for merchandising is geared to speed, to rapid change, to mass production and to vast promotion campaigns. Steamers are too slow to convey style merchandise, or new models of mechanical equipment, speedily enough to fit into most North American merchandising plans. Now display goods, contracts, credits, salesmen, etc., are carried back and forth almost as handily as at home. Latin Americans, on the other hand, can keep in more constant touch with their American markets and their representatives here.

Perhaps the most notable change that has been brought about by the reduction in traveling time is the new model of flying businessman. Top executives, men of responsibility, no longer delegate their remote problems to subordinates. They themselves shuttle between the continents. For example, when it required a month of travel for the representative of an American firm in the Argentine to make the round trip to his home office, the representative was frequently chosen for qualities comparable to those of our own drummers of another time and day. He was usually a man firmly entrenched in the native scene, a man who knew how to play petty politics for favors, yet a man whose salary must be kept small enough for his annual trip home not to represent too great a waste. With some exceptions, of course, business could not afford to expend its best executives on such assignments. Today, with the time to the Argentine reduced to four days, it is possible for a responsible executive to spend a week adjusting or negotiating a transaction there, yet complete the round trip, including his errand, in a fortnight. He can keep constantly informed on the problems of his resident agents; and, needless to say, the business man of this new air-minded generation does not follow the old-time business diplomacy. He and his counterpart in Latin America are developing into business statesmen, in tune with an age as direct as the airplane itself.

The airplane, for example, is not impeded by the delays common to steamers. It is to the credit of Pan American Airways that at practically every base along their lines they have cut the red tape for passengers as well as for express. A passenger steamer, with a leisurely approach from quarantine to dock, can afford a certain amount of bureaucracy aboard and at the customs. An airplane, which may stop only 20 minutes in a single

small country, cannot easily accommodate its schedule to the whim of innumerable routine documentations. This elimination of friction is especially well illustrated in the handling of express. Whereas a marine shipment, regardless of whether it is an 8-ounce watch or an 8,000-pound automobile, is handled as freight and subject to from ten to a dozen documentary procedures at its destination, a shipment by air is cleared entirely by one piece of paper—the "airwaybill".

To appreciate how remarkably air transport has facilitated the convenient flow of passengers and packages is to understand the aerial vanguard of much foreign trade of the future. In comparison with surface vessels, the planes themselves carry a limited amount of goods, consisting largely of display merchandise and mail; and they carry a limited number of passengers. But their cargo serves as an elementary demonstration of the value of first-hand contacts in commerce. Many sidelights might be cited as evidence of increasing international amity. In South America, until very recently, almost the only kind of news that was published from the United States dealt with our bizarre crimes or sensational gang wars. But when photographs, lengthy news articles, photographic mats and news films were made available by air express, the press of the Latin American Republics soon discovered that our social and economic news was more interesting than our train wrecks and chorus girls. They were well prepared for the visit by President Roosevelt and Secretary Hull last winter. Certain of their metropolitan dailies carried news of the recent Supreme Court discussion as comprehensive as that to be found in the papers of London or Manchester. In an effort to promote the converse of this intangible contribution to better understanding, both of the major United States news services, AP and UP, are now surveying South American news sources and encouraging more modern reporting of their news to us. These exchanges of understanding, these gains in goodwill, like the development of greater trade, contribute to that friendly solidarity of the Western Hemisphere which is so devoutly hoped for by Americans from Nome to the Horn.

In addition, the tourist trade, although it will probably never rival that to Europe in numbers, is introducing us and our neighbors to the south of us to one another. It is as easy to hop from Florida to the West Indies as it is to cross the English channel.

The tourists' acceptance of speedy travel in that direction was never more pleasantly portrayed than by one of Will B. Johnstone's amusing cartoons in the New York World-Telegram last winter. "The boy who wanted to be a pirate and sail the Spanish Main" was pictured reading the schedule of departures and arrivals at the Biscayne Bay airport in Miami. The schedule which he beheld, although rich in romantic geographical names, was as businesslike as a train chart in Grand Central Terminal. Havana, Buenos Aires, Cristobal, Trinidad, Puerto Rico—all were accessible, all could be reached on time to the minute. Salesmen, tourists, executives and government officials were coming and going, as nonchalantly as if they were embarking for Niagara Falls or catching a bus to Sandusky. And, as the tourist figures reveal, the air passengers have augmented, rather than cut into, the number who have the time and inclination to travel by leisurely steamer. Many of the tourists who are discovering South America, Mexico and the West Indies, by air, are ordinary curious Americans; but happily there is a constant stream of journalists, informed social, political and economic observers, who can record and interpret with authority, as well as with enthusiasm, the people and places which are inevitably becoming more closely knit into our own scheme of things than they were in a day and age when we scarcely cared where our coffee, bananas, quinine or sugar were produced.

But airways have become more than tradeways. While broadening understanding and knowledge of our neighbors—once remote, but now within a few days' journey—they have, at the same time, become peaceways, in the broadening of goodwill between the countries whose boundaries they cross. An intricate and urgently needed part of some great machine in Brazil, rushed by plane, may save many thousands of dollars in losses in manufacturing. The result is commercial goodwill. The gratitude of an anxious diplomat, rushed by air on an important mission to some far-distant city or perhaps across two continents to the bedside of an ill member of his family, cannot help but be reflected in improved diplomatic relations. And when the airways become agencies of mercy, the first and sometimes the only available means of rushing food or medical supplies or an urgently needed serum to some inaccessible spot stricken by earthquake, hurricane, flood or disease, their value as carriers of goodwill

cannot be over-rated. The incidents cited are not hypothetical—they have happened again and again in recent years, and have been a factor of untold importance in bringing to a reality the "good-neighbor policy" toward which our political leaders have been working.

Of course, the pattern which the Clipper Ships are marking upon our national and our personal relations with Latin America is paralleled by similar patterns elsewhere in the world where swift communication has brought neighboring, and distant, people within genuine reach. But nowhere in the world are such rich and complementary potential trade areas connected. Nowhere else have such varieties of peoples and resources been equipped with such extraordinary communications. The American business man, more than any other in the world, is a merchandiser; he would rather fly a piece of machinery 6,000 miles than maintain a costly inventory in a remote spot; he knows the value of time-saving as an advertisement of his technology. And he knows that Latin America is no longer a market to exploit, but a market to develop, to buy from as well as to sell to. His investments there in the future will be based upon sounder study than they have been in the past.

Meanwhile, Pan American Airways is blazing a trail to other corners of the world. The survey just completed of a feasible 4-day route to New Zealand—instead of a 30-day steamer voyage—means that the United States, as the nearest industrial country, is bound to become more important than ever in the Australasian market of 60 million people. The Clippers to and from China, Manila, Honolulu already are booked weeks in advance. On regular weekly schedule across the Pacific, they foreshadow the kind of accommodations we may expect to Europe when the new Atlantic planes and routes are thoroughly tested.

Thus in the field of foreign trade and travel the airway is destined to become an essential member of that honorable family that already includes the cable, the telephone and the wireless. More than any of these, however, the airway tends to standardize business practice, to bring distant men together. Business executives and technologists, as well as statesmen and capitalists, are becoming better acquainted, and out of that acquaintance is growing the friendship and goodwill which characterize the good neighbor.

THE UNIFICATION OF ARBITRATION LAWS

BY

R. S. FRASER

Chairman, Commercial Arbitration Committee, International Law Association

THE speeding up of communication and, though in a lesser degree, of the transport of goods, has accustomed men to the use of the terms " national " and " regional ". Few probably appreciate the transition stage through which the world is passing from the one to the other and the consequential need for the unification of commercial law, as well as that of procedure followed in arbitration under national laws—or, in other words, for the avoidance of what lawyers term in international private law the " conflict of law ". The commerce of most countries, as carried on nowadays, is largely regional, extending far beyond national frontiers.

The arbitration clause, coming at the end of a contract, is but too frequently regarded as of small moment, though when a dispute later occurs it may prove to be a determining factor. Pending the standardization of forms of contract, recourse may be had to the expedient, adopted generally throughout the period covered by the Great War, of appending to printed forms of contract tabs or slips of paper inscribed with modifying or additional terms considered requisite.

The Geneva Convention of 1927 for the enforcement of Foreign Awards was accompanied by a Report issued by the Committee of Legal Experts to the Economic Committee of the League of Nations (April 5, 1927) which said:

> It would be difficult to establish a collective agreement on the international effect of arbitral awards. If such an agreement is to be of real use, it must include certain detailed provisions. These become more and more complicated in proportion as the circle of States to which the agreement is applicable increases; account must be taken of the differences existing between the various systems of law, more particularly in connection with the actual scheme of arbitration; of the relationship between arbitrators and the Courts; of the system adopted for the enforcement of decisions given abroad. Existing analogies or differences affecting the law in general or systems applied in cases of the Conflict of Laws must also exercise a certain influence in the matter. It must be remembered that the validity of foreign arbitral awards will be accepted with a readiness related to the guarantees which are afforded by the arbitral practice of any given country. In a collective agreement there is a tendency to multiply the precautions taken. The

risk involved by entering on such a course is that any agreement reached might be retrogressive as compared with the existing law and practice of certain individual countries—instead of facilitating the execution of foreign arbitral awards, it would, to a large extent, impede it.

It is reasonable to conclude that the draftsman of the Scheme of the International Institute at Rome for the Unification of Private Law, which it is proposed to submit to the Congress of the International Chamber of Commerce, to be held in Berlin between June 26 and July 3 next,[1] will have had his attention directed to the Report mentioned in the preceding paragraph, but it is difficult to perceive in the Scheme itself any serious attempt to remove the difficulties to which the Report directs attention, as such Scheme would permit of their continuance whilst adding one more to the divergent systems which it was the object of the Report to remove.

It would be reasonable that a trader who supplies goods on credit to another should select the place of arbitration for the recovery of payment therefor, but seemingly such is not the present law, according to which he may be required to engage in proceedings in a far distant country regardless of the standard of justice it may observe. If this is the present law it should be replaced by one affording adequate facilities for determining questions or differences which may arise.

There is considerable force in the view that, in the absence of agreement to the contrary, appeals to a Court of Law in the course of a reference to arbitration or based on an award should lie to a Commercial Division of the International Court of Justice.

The London Court of Arbitration, consisting of representatives of the City Corporation and of the London Chamber of Commerce, prescribes the following arbitration clause or clauses for insertion in international commercial contracts:

> The construction, validity and performance of this contract shall be governed by the law of England and all disputes which may arise under, out of, or in connection with or in relation to this contract shall be submitted to the arbitration of the London Court of Arbitration under and in accordance with its Rules at the date hereof.
>
> The parties hereto agree that service of any notices in the course of such arbitration at their address as given in this contract shall be valid and sufficient.

[1] Mr. Fraser's article was prepared in the early part of June, 1937 [Ed.].

The arbitration clauses above mentioned were submitted to and approved by the Conference of the Federation of Chambers of Commerce of the British Empire held at Cape Town, in September, 1927. The American Arbitration Association and other high institutions have designed like clauses; but, in addition, the American Arbitration Association has successfully accomplished more in the international sphere than any other institution in the establishment of an Inter-American Commercial Arbitration Commission, following upon intensive study, which secured the adoption of the Pan American Scheme for arbitration between nationals of the United States and 20 other American Republics, which has had the commendation of President Roosevelt [2] and Secretary Hull.

The Commission is guided by standards which were approved by the Seventh International Conference of American States and which incorporate the important principles of the Anglo-Saxon System, while conceding to citizens of the Latin American Republics the option to follow procedures with which they may be more familiar, as prescribed in their prevailing arbitration laws.

As evidencing the general consensus of opinion the following Resolution of the International Law Association was passed at its Conference in New York in September, 1930:

> That in order to safeguard the security of transactions in international commerce it is necessary that agreements between governments be entered into to regulate the essentials of arbitration practice and procedure between nationals of their respective countries and to provide for the reciprocal enforcement of commercial agreements and awards made pursuant thereto, provided these arbitrations have been conducted under institutions of high standing and which possess the necessary facilities.

Merchants as a class have, from the dawn of civilization, regulated their commercial relations by the "law merchant"; and leading trade associations have in recent years silently, but effectively, advanced the unification of commercial law by grading up the forms of contract prescribed by them to meet present day conditions, including such as are termed "equitable". The arbitration clause which many favor provides for the reference of disputes to one or more arbitrators nominated by a named association of approved standing in place of either party nominating one and the two thus appointed nominating an umpire. It provides further that the arbitration shall be conducted under

[2] See Vol. 1, No. 2, p. 184.

the association's prescribed rules, which include provision for the correction of error in the course of a reference or on an award by a trade tribunal of appeal; the measure of relief thus afforded not being restricted, as in England, to the correction of error on a point of law appearing on the face of an award, whilst leaving a party otherwise injured, however egregious the error may be, without redress.

Expedition, efficiency, uniformity in the interpretation of mercantile terms, and the restriction of expense, are thus sought and normally attained—and this more particularly where the only difference between contracting parties is one of quality, size or description. Where, too, the facts sufficiently appear in correspondence, parties to a dispute not infrequently refrain from attending a formal hearing in the arbitration, though it is open to them to be present and for one side to test, by cross-examination, the evidence of his opponent. The setting up of Trade Tribunals of Appeal goes far to afford protection against the scandal of conflicting decisions by Foreign Appeal Courts of Law, whether on the terms of a contract or on the facts. The jurisdiction of Courts of Law to review error may not be ousted, but after analysis before a Trade Tribunal of Appeal little is left for further argument or discussion.

Professor Gutteridge K. C. (England) directs attention to the divergencies between the Anglo-American system in arbitration and such as are followed in Latin, Germanic and Scandinavian countries. He starts by noting

> the gradual drifting away of commercial litigation from courts of law into the hands of commercial arbitrators, a tendency reaching its apex in the domain of the law of the Sale of Goods,

and he then suggests that

> in cases arising out of international trade, one of the main features producing this untoward result is the uncertainty of the law, or, rather, the conflict of laws, which so often arises when goods pass through several hands before coming to rest with the ultimate purchaser. But despite all discouraging hindrances there is no reason to think that unification is inherently impossible, if all parties are willing to avoid insistence on points of legal technique, and to abandon homogeneity in the interests of substantial uniformity.

The Professor notes

> the absence of any definition or very clear understanding of what we mean by "merchantable", whilst the learning regarding "market overt" might well be laid away in the lumber room of the law.

He further comments that

> the rules where the parties have failed to express an intention as to when the property is to pass are more or less arbitrary. Other criticisms seem to qualify the view that the passing of risk and the passing of property are live concepts which have proved to be uneasy bed-fellows, whilst the passing of risk might well form the subject matter of a separate rule free from the complexities which surround the transfer of the legal ownership of goods.

The Professor continues:

> An important question which has arisen is whether the contemplated international code should deal only with international sales, or whether it should include domestic transactions in the various countries. No decision has been arrived at as to this, but it is noted that a precedent for a uniform law confined to international transactions is furnished by the Berne Railway Convention of 1924. No distinction, however, should be drawn as in Continental Law between commercial and non-commercial sales.
>
> In many cases identical rules have been found to prevail in the different countries. In other cases the differences have been recognized as slight. In a number of instances, however, very serious divergencies have been found to exist, and this has been especially the case with regard to (a) formation of the contract and (b) remedies for non-delivery of the goods.

Readers of this paper will appreciate that evolution does not march *pari passu*, whether with individuals or with countries—hence the selection of the arbitration clause appearing in a commercial contract should be scrutinized before the contract itself is approved. It is expedient that the law of a country observing a high standard and with which one of the parties is closely connected should regulate the construction and performance of a contract and the procedure to be followed in arbitration.

The possibility of recourse to successive appeals in foreign courts of law arising out of arbitration will not be entertained by a contracting party. It is argued by some writers that contracting parties are restricted in prescribing the law of a particular country to one with which one side or the other has actual relations, but thus construed such a restriction allows all-sufficient scope for selection.

Apart from arbitration a scheme termed "conciliation" is advocated in Italy and France, to enable parties in difference to effect a settlement without the need for observing the law, it devolving on the conciliator to act in accordance with his conscience—but any scheme that permits of the substitution of

injustice for justice is unworthy. In conciliation a conciliator is otherwise named an "*arbitrator de facto*" or "*amiable compositeur*".

The efficiency with which the Anglo-American system of arbitration works in England is illustrated by the following table of results furnished by the London Jute Trade Association:

	Arbitrations	Appeals	Confirmed	Raised	Reduced
1931-32.....	804	25	17	3	5
1932-33.....	673	17	12	2	3
1933-34.....	750	27	14	10	3
1934-35.....	1031	56	32	12	12
1935-36.....	1540	50	26	10	14

Mr. Charles S. Haight, Chairman of the Bill of Lading Committee of the International Chamber of Commerce (reported in "World Trade" July-August 1936) observed:

> It was literally true, only 15 years ago, that no two countries in the world had the same law governing the rights of shippers and the obligations of carriers. . . .
>
> The importance of the movement (towards unification) cannot be missed by anyone who stops to consider the facts. Every export shipment must have five parties connected with it—the shipper, carrier, discounting bank, cargo underwriter and consignee. In most countries three or four of these parties are of different nationalities, and not infrequently five different countries are represented. Under such circumstances it was absurd to handle our international trade under the handicap which was inevitable when the law of every country differed from that of every other country on important questions affecting the rights of cargo owners and the obligations of the carrier. . . .
>
> The only possible result was friction and litigation constituting a serious trade barrier which was of benefit to no one and prejudicial to all. . . . The problem was an international one and had to be handled internationally. . . . I hope that no one will think that we can now congratulate ourselves and quit work. This survey of our past labor will be useful only if it spurs us on to finish the job, and to do so promptly. . . . There is much wisdom in the slangy expression on our side "Let's go while the going is good". Work still remains to be done.

Mr. Haight's remarks will be found to be equally appropriate to the grading up of commercial arbitration.

KING COTTON KEEPS THE PEACE

BY

CLAUDIUS T. MURCHISON

President, Cotton-Textile Institute, Inc.

KING COTTON rules a far-flung empire. Millions of livelihoods are dependent upon an industry which is so complicated that one of its members can spend his life in one branch without ever knowing what is going on in the others. Every sea is crossed by ships bearing cotton; every individual in the civilized world uses the finished product. How, then, does King Cotton rule his millions of subjects; how does he dispense justice and keep the peace between the many sub-divisions of his kingdom?

Like every other great industry, cotton is troubled by perplexing problems from within and hard pressed by attacks from without, with old, long-accepted principles and methods yielding to new ways of carrying on commerce and new ideas of economic and industrial cooperation. But it is not the first time that a great world industry has been faced with a situation similar to that facing the cotton industry at the present time. In the middle of the eighteenth century, primarily because of the introduction of what today is called the "factory system", the industry in England was confronted with a "new day" just as radically different from any period previously experienced as the one which exists today.

In that now remote time it was the principle and practice of arbitration that was largely instrumental in bridging the cotton industry over the chasm of inevitable and dangerous change.

During the years which have followed the industry's early and satisfactory experience with arbitration, during which time both the principle and the procedure have become clarified by statutes and decisions of the courts, the cotton industry has applied arbitration to controversies within its field on a really world-wide scale. Thus we find the Bourse de Minet el Bassal (Alexandria, Egypt), the Havre Cotton Exchange, the Bremen Cotton Exchange, the Exchanges of Milan, Rotterdam, Ghent and Barcelona all afford the facilities of arbitration to their members and traders for the determination of trade disputes. While the arbitration systems in these various markets are not, of course, entirely uniform, they enjoy many essential important features

in common, which promote the acceptance of arbitration and the securing of equitable awards and rulings.

In Liverpool, there is no designated arbitration committee to hear disputes in the first instance, as in America. Each party to a dispute chooses an arbitrator from the membership of the Liverpool Exchange, and if these two cannot agree upon a decision they may call in an umpire, which, in fact, is usually done.

The functions of the arbitrators are broader in Liverpool than in the United States. In the first place they have to decide whether or not the cotton tendered comes within the limits of the contract—whether it is equal in color to the standard, of not less than fair staple, and not below low middling in grade. Next, the value of the particular grade and staple tendered relative to the basis of the contract is determined as so many points on or off the basic price. As there are no official staple standards in Liverpool and no official quotations for staple differences, the amount of the allowance is entirely a matter for the judgment of the arbitrators.

Appeal from this decision may be had to the Appeal Committee. They re-value the cotton and make an award, and if one of the parties still feels that error has been made, he may appeal this decision to the Board of Directors of the Liverpool Cotton Association. The outstanding feature of the Liverpool system of valuation on appeals, which differentiates it particularly from the system in use in America, may be said to be that in Liverpool they think in terms of value, while in America they think in terms of grades. Under the Liverpool system the final result of the appeal is a determination of the actual value of the cotton by the Appeal Board and there is no subsequent reference to any outside scale of spot price differences.

A unique and interesting feature of the system established by the Liverpool Cotton Association is the fact that the Association maintains a list of arbitrators who serve in rotation and from this list the arbitrator is appointed, upon application of the parties, without his identity being disclosed. The arbitrator examines samples of cotton which have been taken from bales which are the subject of dispute and from which all distinguishing marks have been removed before the examination, so that the arbitrator likewise has no knowledge as to the owner of the product he is judging.

The Liverpool system of arbitration extends to many other matters than the valuation of cotton. All kinds of questions that may arise as to the execution or fulfilment of contracts must, under the terms of the contract, be referred to arbitration. Moreover, the habit of arbitration has become so fixed among the members of the Association that other questions arising between the members on matters not directly arising out of contracts are frequently referred to the Board or to the President for settlement, and are in many cases disposed of by arbitration. The result is that litigation in regard to any question arising in the cotton trade is extremely rare.

Of especial interest to a world that is becoming increasingly internationally-minded is the arbitration plan of the International Federation of Master Cotton Spinners' and Manufacturers' Associations, established in 1904 as a sort of eagle-eyed sentinel and guardian over this phase of the industry, protecting the common interests of a world-wide industry and advising affiliated associations in action against any common danger. The greater part of the cotton industry is covered by the 21 countries represented in the Federation. A pioneer in international arbitration, the Federation had, as early as 1912, rules of arbitration to cover disputes between members who resided in any of the countries represented in its membership.

Turning now to the United States, we find that the industry early felt the beneficial influence of the use of arbitration in Great Britain and followed the lead of the older country in the endorsement and application of arbitral principles. In 1926 the Cotton-Textile Institute was organized as a central body to coordinate activities in the cotton industry and to provide facilities for commercial arbitration within the industry, in close cooperation with the American Arbitration Association. In 1930, the General Arbitration Council of the Textile Industry was formed as a functioning body of the Cotton-Textile Institute. Those organizations, such as the Association of Cotton Textile Merchants, the Converters Association and the Finishers Association, which had heretofore furnished arbitration facilities under their own independent rules and procedure, gradually retired from the field and their members thereafter availed themselves of the services of the General Arbitration Council. Its members now include 13 separate associations in various branches of the industry, repre-

senting producers and their sales agents, finishers and buyers. Its facilities are available in all disputes relating to merchandise produced in cotton mills or by former cotton mills now producing synthetic yarn products, wholly or in part. The Council has an official panel of arbitrators from various branches of the industry, including executives of department stores and factories, containing about 200 names.

In the southern states there was organized, in 1929, at Atlanta, Georgia, the Cotton States Arbitration Board. This is supported jointly by mills and merchants chiefly for arbitrating disputes as to grade, staple and character of cotton sold by merchants to manufacturers. It is estimated that from 5 to 10 per cent of the cotton purchased is rejected by mills and that settlement by arbitration has concerned as many as 300,000 bales annually in certain years.

In the older manufacturing section of New England, organized arbitration has now been functioning for nearly 30 years under the auspices of the National Association of Cotton Manufacturers, and New England Cotton Buyers' Association and the American Cotton Shippers' Association. As in the southern states, the disputes generally involve the question of grade or staple of cotton as between buyer and seller.

So much for what King Cotton has done and is doing to keep the peace in his own family. But there are important countries outside our immediate family with whom peace must be kept and goodwill maintained. I may cite one instance:

I have recently returned from Japan where the cotton industry has demonstrated again its capacity for creating and preserving goodwill throughout its far-flung kingdom. The United States-Japanese Pact on Cotton Textiles, which was drawn up by a group of members of the industry of both countries, is a triumph of the principle of private negotiation. It was possible for a delegation of manufacturers from this country, by going to Japan and talking with a group of manufacturers there, to arrive at a voluntary agreement on the limitation of Japanese exports to this country. This truly remarkable document is tangible evidence that broad thinking and a constructive consideration of the other person's point of view is not only possible, but is capable of practical application.

Lord Salisbury, long a British Foreign Minister, once said that any international dispute could be settled by a group of men

sitting at a table. Certainly the cotton industry has demonstrated that by gathering its leaders around a table at an arbitration or a conference, disputes and differences can be settled and such settlement made the stepping stone to a greater understanding, and an increase in those intangible elements of goodwill on which such a large part of the strength of a great industry depends.

King Cotton rules a tremendous kingdom. He can well be proud of his record for keeping peace.

HERBERT HOOVER ON COMMERCIAL ARBITRATION

"I have been for many years of the conviction that the arbitration of commercial disputes in place of avoidable litigation is an agency of the first rank in the promotion of business efficiency. Information collected by the Department of Commerce over the past several years has clearly showed that the substantial element of the American business public is overwhelmingly in favor of arbitration in the settlement of commercial disputes.

"The reason for the rapid rise of the commercial arbitration movement from a dream and a theory to a reality and practical adoption lies in the adaptability of arbitration to the multiple problems that arise in dealings between units of organized business. Within a chamber of commerce or a trade association it is possible to standardize many of the differences and conflicts which arise in the performance of every day contracts. Such inevitable conflicts are often amenable to prompt settlement by those who know the particular trade and enjoy the confidence of the parties in dispute."

AMBASSADORS OF GOODWILL

LORD ASKWITH

BY

W. T. CRESWELL

THE Right Honorable Lord Askwith, K. C. B., K. C., D. C. L., the doyen of arbitrators, has probably played a greater part in conciliation and arbitration in labor and like disputes than any other Briton. As George Ranken Askwith, he became a member of the Inner and Middle Temple in 1886, a King's Counsel in 1908, and after being honored with a knighthood, was created 1st Baron Askwith in 1919.

During his very busy life, Lord Askwith, apart from his purely legal work, has occupied positions and held appointments in the industrial world of much diversity, and a mention of some of these will illustrate his tremendous activity. He was Chairman of the Industrial Council in 1911; Chairman of the Fair Wages Advisory Committee, 1909-1919; Umpire to the Scottish Coal Conciliation Board, 1913-1915; Chairman of the Government Arbitration Committee under the Munitions of War Acts; a member of the panel for Commissions of Inquiry under Art. 412 of the Treaty of Versailles; President of the Institute of Patentees, 1925-1935; and President of the National Association of Trade Protection Societies, 1924-1927 and 1928-1929. From 1933 Lord Askwith has been President of the Institute of Arbitrators, a body concerned, among other things, with the task of training arbitrators and of supplying them, particularly in cases of disputes arising, as they so often do, out of contractual relations in the course of building and engineering enterprises.

Lord Askwith is a born arbitrator and conciliator. He has been described in a recent work as embodying the very spirit of compromise, "which is a very English spirit". His services to the community in connection with the following trade disputes, particularly, are worthy of special mention: the Cotton, Boilermakers' and Coal lock-outs and strikes of 1910 and 1911, the Seamen's and Firemen's Strike, the great London Transport Strike, the Railway Strike and the Liverpool Dockers' Strike, all of 1911, and the London Transport Strike of 1912.

The subject of this short sketch has remained, as all wise men do, a student. Always a profound thinker, he has embodied much of his experience in his work "Industrial Problems and Disputes" (1920) in which, disdaining to be a prophet, he has clearly stated his views, opinions and conclusions upon facts well known to him.

Even at the present time (he is 76 years of age) Lord Askwith, who has given unwearying service to the cause of industrial peace, has been, with others, very active in the preparation of a new Arbitration Bill, which, if it passes through Parliament, will remove what he, in common with the bulk of those interested in arbitration, consider a blemish upon our present law. In a word, it is directed against the possibility of a party to an arbitration agreement, or any engineer, architect, officer, servant or agent employed by him, acting as sole arbitrator should a dispute arise. This bill follows a previous bill which he succeeded in getting through both Houses of Parliament in record time and which is now embodied in the law as the Arbitration Act, 1934.

This is what a great labor leader once said of our subject: "a patient, plodding man . . . who listened without sign of being bored or absorbed . . . never raising his diplomatic voice, or appearing to hurry over anything; guiding without falter or apparent effort the disputants, however heated they may be . . . And such patience!" Here, in a few words, is surely described the model conciliator.

Finally, it may be said that Lord Askwith brought into form and order the methods and policy of conciliation and arbitration, particularly in disputes between capital and labor, throughout Great Britain; that the confidence given to him caused his decisions during the War, when compulsory arbitration came into force, to be accepted without question, affecting as they did the wages and conditions of millions of his countrymen; and that since the War he has cemented his work on a sure foundation for future development.

THE ARBITRATOR

THE LAYMAN AS JUDGE

BY

HERMANN IRION

Manager, Steinway & Sons

THE principle of Commercial Arbitration appealed to my sense of efficiency and practicality as soon as I became acquainted with the purposes of the American Arbitration Association and the conduct of its Tribunals. It was a pleasant surprise to find that both business men and the legal fraternity had met on the common ground of attempting to establish ways and means to settle and dispose of ordinary business disputes and misunderstandings, expeditiously, equitably and satisfactorily, and in avoidance of the technicalities, the delays and the costs of litigating in the law courts.

I do not wish to appear as in any sense detracting from the high standing of the legal profession and the operation of our courts of law, for which I have the highest respect, but it is a well-known fact that many a principle is abandoned or a loss is assumed rather than to undertake the onerous, time-consuming burden, quite apart from the cost, of entering upon a law suit. Quite frequently, too, the rules of evidence, which are so strictly adhered to in the conduct of trials in our courts, create the feeling among litigants and particularly with the defeated party, that their case did not receive a fair hearing. The rules referred to are those which permit witnesses to answer only "No" or "Yes" under direct and cross-examination in order to guard carefully against the admission of so-called irrelevant or immaterial statements by witnesses. And how frequently are suits lost or won, as the case may be, not on the merits of the facts involved but on the greater alertness and ability of one or the other of counsel?

Most of these serious objections to litigation are non-existent in the method of commercial arbitration, primarily, of course, because the controversies submitted to boards composed of laymen deal almost exclusively with questions of fact. The chairman of the board can and does permit each party to tell the whole

story, whether strictly relevant or not, after which it behooves the board to separate the wheat from the chaff. Furthermore, there are no delays. A case is heard on the day and the hour for which it is set and, except in unusually difficult and protracted instances, disposed of on the same day or the next one. And, last but not least, all at trifling expense and a minimum loss of time.

Based upon my own experience as an arbitrator in many and varying controversies, I am firmly persuaded that despite all of the simplicity and expeditiousness with which arbitration can be put into operation, no serious cases of injustice occur in the awards, and the frequency with which both parties to a dispute have expressed their satisfaction and appreciation of the final outcome seems ample evidence that judgment was not far from right.

After all, if law is the epitome of logic and sound judgment, is it not fair to conclude that these essentials can also be applied by laymen possessing a fair degree of trained reasoning power and logical thinking, which makes the position of an arbitrator at once interesting and instructive, on the one hand, and valuable to the contending parties on the other?

When a person accepts the duties of an arbitrator he becomes conscious of the responsibility which this office confers on him and he will try to avoid the pitfalls which prejudices or hasty judgments would open for him. And, finally, let me say that to sit as an arbitrator, either alone or on a board of three or more, offers to a layman a liberal education and presents an opportunity for the study of human nature under conditions usually reserved to the legal fraternity. All of which constitute my reasons why I am always glad to respond when called upon to serve.

NOTES ON ARBITRATORS

MR. IRION'S statement that acceptance by business men of the duties of arbitrators implies also an acceptance of the responsibilities of that office is illustrated by the following cases, taken from the records of the American Arbitration Tribunal:

The Arbitrator as a Personal Investigator. A clothing manufacturer claimed that a consignment of 2,400 yards of a high-pile fabric purchased from a woolen mill was not a good delivery and

was not in accordance with the sample on which the order was given. After the submission of testimony and an examination of the exhibits, the arbitrators came to the conclusion that there was a wide fluctuation in the quality of the cloth delivered and decided to make a personal examination of the entire lot of 2,400 yards before making an award, thus illustrating the painstaking examination to which business men, as arbitrators, subject merchandise in disposing of a controversy as to its quality.

Arbitrators Refuse to Serve in Questionable Proceeding. Two brothers entered into an agreement to arbitrate a controversy between them concerning the disposition of money taken from a corporation in which they were partners, the money being held in the names of their respective wives and father. At the beginning of the hearing it was disclosed that none of of the creditors of the corporation had been paid, that the brothers had simply ceased doing business, and that the division of the funds of the corporation to members of the partners' families practically defrauded the creditors of the assets. When the brothers admitted that their primary purpose in submitting their differences to arbitration was to prevent publicity concerning the division and to conceal assets from creditors, the arbitrators refused to sit in what was obviously a fraudulent proceeding and resigned.

Private Visit to Arbitrator Leads to Resignation. A friend of one of the parties in a proceeding, who was also acquainted with a member of the board of arbitrators, visited the arbitrator on the morning of the day of the hearing and advanced certain arguments in favor of his friend's claim. When the arbitrators and parties met for the hearing, the arbitrator in question announced what had happened and stated that he felt he should resign, giving as his reason the incident of the morning. The party involved disclaimed any knowledge of or responsibility for his friend's action, and as an evidence of his good faith offered to make a settlement with his adversary, the terms of which were satisfactory to the latter. The matter was thereupon disposed of without a hearing upon the agreement of both parties to accept the terms of the proposed settlement.

AMERICAN ARBITRATION NEWS

Arbitration Tribunal's Half-Year Record. The Decennial Report of the American Arbitration Tribunal, issued January 26, 1936, reported that a total of 5,646 controversies had been referred to the Tribunal during the 10-year period covered. Indicative of the widespread growth of arbitration in the United States in recent years was the report of the Tribunal for 1936, which showed a total of 2,536 cases submitted, or nearly half as many in that year as were received in the previous 10-year period. The figures for the first six months of 1937 show that this increase is continuing, a total of 1248 cases having been referred to the Tribunal.

A Business Man's View of Arbitration. Commercial arbitration as an aid to world peace was discussed by F. W. Nichol, Vice President and General Manager of International Business Machines Corporation, in a world-wide broadcast on April 4, 1937. Mr. Nichol, in reviewing the business man's contribution to world peace, said:

> Every arbitration clause that is included in a commercial contract is an instrument of peace, whether the transaction is entered into by two business men of the same city or two business firms of different nations. And every man who acts as an arbitrator in disposing of controversies between two fellow-men or between disputants of different nationalities becomes an ambassador of goodwill.
>
> Business men dealing with foreigners as customers, competitors, debtors or in any other relation should remember that their practices have not only their domestic importance, but an added importance as well. Good business behavior improves international goodwill; bad behavior creates international friction. Arrangements providing machinery for business arbitration contribute to confidence and goodwill, and should be further developed.
>
> If we examine the small warfare we call litigation, involving perhaps but two individuals, or the great wars of the world, involving many nations, we find that they are largely traceable to avoidable differences. These differences are generally concerned with some right or possession in commerce. To remove from commodities their capacity for inciting litigation, or war, is, therefore, a peace undertaking of the highest order.

Japan Sends Economic Mission to the United States. A group of Japan's leading business men, comprising the Japan Economic Mission, sailed from New York on June 16, after having visited the larger industrial centers in the United States over a period of several weeks, conducting a study which, it is hoped, will contribute to international understanding and the elimination of antagonisms between the two countries.

In referring to the program of the Japanese Mission, Mr. Thomas W. Lamont, in an address delivered at a luncheon in their honor in New York City on June 15, said:

> It exemplifies far more than increased reciprocal trade and means more than the building up of mutual goodwill. It exemplifies earnest study and the hard work that is necessary to create a status of understanding and sympathy so great that it will be a bulwark for peace, not only between our two countries, but in the world at large.

Mr. Seichi Takashima, a collaborator of THE ARBITRATION JOURNAL for Tokyo, was a member of the Mission. On Monday, June 7, the visiting delegation were guests at a reception at the headquarters of the American Arbitration Association, to meet the officers and directors of the Association and inspect its Tribunals.

Governor Signs Revised New York Arbitration Law. The bill to amend the New York Arbitration Law and Civil Practice Act, the introduction of which was reported in the April issue of THE JOURNAL, was signed by Governor Lehman on May 17, 1937, and becomes effective September 1 of this year.

The official text of the new law may be obtained from the American Arbitration Association, upon request, without charge.

Recent Trends in Comparative Law. Dean John H. Wigmore, of the Northwestern University School of Law, addressed the Section of International and Comparative Law of the American Bar Association in Washington, on May 5, 1937, on the subject of "Recent Trends in Comparative Law", which, according to Col. Wigmore, have taken four different directions in recent years: (1) toward assimilation of the substantive laws of different countries; (2) toward cooperation in the prompt settlement of commercial disputes; (3) toward providing information on foreign laws useful to commercial houses; and (4) on the part

of practicing lawyers, toward becoming alive to the knowledge of foreign law. In discussing the settlement of commercial disputes, Col. Wigmore said:

> This signifies the use of international commercial arbitration. Other methods of settling legal disputes between parties in different countries are suitable enough for some classes of cases—I mean, a lawsuit in the courts of the other country, or a governmental convention for the settlement of claims against a government. But for commercial disputes the only efficient method is international commercial arbitration. My impression is that most of our merchants whose business is exporting or importing are not familiar—I will even say, not aware of the efficient methods that are available for them today. If I am correct in this impression, it is a great pity. The help of the American Arbitration Association is always at their disposal; its connections extend all over the world.

New York Building Congress Revises Rules. Shortly after the organization of the New York Building Congress, Inc., with a membership of individuals, firms and corporations in New York City interested in or connected with the construction industry, an Arbitration Committee was established and rules for arbitration developed. The inclusion of an arbitration clause in contracts was one of the first educational programs of the committee. Because of the nature of a building contract and the many and various elements involved, arbitral methods are peculiarly adaptable to the needs of the construction industry. Many unforeseen problems may arise, no matter with what faith a contract may be entered into; consequently, arbitration is the natural and practical method for settling misunderstandings in the industry.

During the past year the Arbitration Committee of the Building Congress has revised its rules to bring them more into conformity with those of the American Arbitration Association. At the same time the cost of hearings was reduced. Under the former rules, arbitrators were paid an honorary fee for their services, but a fixed fee of $5.00 an hour has now been established.

For several years the Arbitration Committee was largely active in furnishing information leading to the settlement of disputes without formal hearings. The last eight months, however, have seen an increased number of hearings, which is one of the many signs of revived activity in the construction industry.—FRANCES E. HARRIS.

Actors' Equity Reports Growth in Amicable Adjustments.[1] In its annual report on arbitrations for the fiscal year ending March 31, 1937, Actors' Equity Association states that for the past several years the number of arbitrations instituted on behalf of its members has shown a steady decrease, with a corresponding increase in the number of differences amicably adjusted without the necessity of formal arbitration proceedings. In the year covered by the report there was a decrease of 17 per cent in the number of arbitrations as compared with the previous year, when there was a decrease of 42 per cent from the number in the preceding year.

The report states that during the year, 19 arbitrations were instituted in the American Arbitration Tribunal on behalf of Equity members, involving a total amount of over $32,000, with several cases concerning a determination of rights under Standard Equity contracts instead of specific sums of money. Of the cases filed, 10 proceeded to a hearing and award, seven cases were settled after the matter had been filed but before a hearing, one claim was withdrawn and one matter is still pending.

Lectures on The Technique of Export Trade. The School of Commerce at New York University offered during the Spring Semester a course conducted by Ferdinand Meyer Labastille, Professor of International Trade, entitled " The Technique of Export Trade ". Professor Labastille endeavored, during the 10 weeks' course, to have the students realize that the task before the intelligent foreign trader is not only that of selling as much as he can, but that, in order to be successful, one must have a thorough understanding of the technical procedure attending export transactions. The rights and duties of the different factors of foreign trade were discussed from the practical as well as from the legal point of view. Mr. Louis O. Bergh, of the law firm of Turnbull and Bergh, was guest speaker at one of the sessions and spoke of the legal relations in the trade between the United States and Latin America. Two additional hours were given over to the presentation of arbitration cases and of the settlement of disputes arising out of contractual relations with citizens of other countries and the machinery of arbitration in particular.

[1] For fuller report, see *Equity* for June, 1937 (Vol. XXII, No. 6, p. 14).

The students made the discovery that the raw material trade lends itself particularly to the establishment of arbitration and that, although arbitration is being used more and more in the trade of manufactured goods, it cannot be used so readily as in the trade of raw materials. The latter is carried on along well established channels and according to customs and methods known to all who deal in a particular line of products. In the field of manufactured products the only real experts who might serve as arbitrators are often the competitors of the concern involved in a dispute. However, through the formation of the Inter-American Commercial Arbitration Commission competent arbitrators are ready to serve without compensation.—FERDINAND MEYER LABASTILLE.

FROM THE LAST WILL AND TESTAMENT OF GEORGE WASHINGTON

". . . Having endeavored to be plain and explicit in all the devises, even at the expense of prolixity, perhaps of tautology, I hope, and trust, that no dispute will arise concerning them; but if, contrary to expectation, the case should be otherwise from the want of legal expression, or the usual technical terms or because too much or too little has been said on any of the devises to be consonant with law, my will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants, each having the choice of one, and the third by those two,—which three men thus chosen shall, unfettered by law, or legal constructions, declare their sense of the Testator's intention; and such decision is, to all intents and purposes, to be as binding on the Parties as if it had been given in the Supreme Court of the United States."

CIVIL AND COMMERCIAL ARBITRATION LAW

ARBITRATION PROCEDURE IN SWEDEN

BY

ALGOT BAGGE

Judge of the Supreme Court in Sweden

In Sweden the State has long permitted parties to stipulate in their contracts that, in the event of a dispute arising regarding the agreement, they shall submit their case to arbitrators, and the State has commissioned its executive authorities under certain conditions to enforce the awards. Stability and clarity were given to this ancient practice more than 50 years ago (in 1887) by the enactment of a Law dealing with Arbitrators. This law, in important essentials, remained in force until the Revised Law dealing with Arbitrators was promulgated in 1929.

Under current Swedish law, arbitration agreements may be entered into relating to disputes which the parties themselves can settle by agreement and disputes over indemnity for loss caused by crime. The law does not apply, however, if the parties have reserved the right to appeal against the arbitration award to a court of law. The agreement can apply both to existing and future disputes regarding named cases of liability. If a due and proper arbitration agreement has been entered into, the dispute cannot be brought before a court of law, unless both parties agree.

Unless the parties have agreed otherwise, there shall be three arbitrators, of whom each party shall nominate one and the two thus nominated shall appoint a third. If either party should not appoint an arbitrator, or those appointed cannot agree as to the third one, an executive authority shall make the choice, unless the parties have agreed otherwise. Proceedings before arbitrators are verbal or in writing as the arbitrators may decide. Arbitrators can call before them the parties and experts, but they have no means of enforcing attendance. The parties may demand a hearing before a court of law. The award must be given in writing. Parties may stipulate the time within which the award must be announced, and if this period is not observed

the agreement expires. If no time is stipulated, six months is the maximum allowed by law.

When any circumstance exists impairing confidence in the integrity and impartiality of an appointed arbitrator, he may be challenged and the arbitration may be disputed before a court of law and may be annulled by the court. Such annulment shall also be pronounced if, through no fault of the complainant, some other error has occurred in the handling of the matter that in all probability can be assumed to have affected the issue.

Unless the parties and the arbitrators have agreed otherwise, the arbitrators determine the amount of their remuneration and what party shall pay the costs. An arbitration award duly made shall be enforced by the executive authority.

This Swedish regulation of arbitration procedure was, in the main, followed by the Committee appointed by the Rome Institute for the Unification of Private Law to draft a proposal for an international law on the subject. One stipulation has, however, been inserted in the draft, which is somewhat at variance with what, by fairly general Swedish conception, should be the task of arbitrators. The conception has never gained root in Sweden that the arbitrators may carry out their duties without observing the civil law applicable to the case in question. Thus our arbitrators do not correspond to the French "*amiables compositeurs*", who can, quite unrestricted by law, arrive at any result they may find appropriate. In the proposal of the foregoing Committee there is a provision which approaches dangerously close to the French standpoint. Among the causes of invalidity is provision that the arbitrators may not have respected relevant rules of law, but that invalidity on this ground ensues only if the parties expressly stipulated the application of these rules at the risk of the award otherwise becoming void.

It does not seem that one should, as in the provision just mentioned, intimate that if there is no agreement to the contrary, arbitrators are entirely free not to observe applicable law. On the contrary it should—as is expressly prescribed in the laws of most of the Swiss Cantons and in Italian law—be their duty not, in this way, to set aside the law applicable to the case. Otherwise all too much latitude is allowed to incalculable personal likings, to the detriment of the security which is of such great importance to the commercial world. There are, it is true, great practical difficulties in enforcing the performance of this duty. The legis-

lation should, however, at any rate go so far as to avoid any stipulation that can be regarded as a repudiation of the principle named.

The proposal of the Committee also diverges from the Swedish Arbitration Law on the permissibility of one party recusing the arbitrator nominated by the other party. According to Swedish law, recusation for insufficient integrity and impartiality can be preferred not only against the arbitrator appointed by the parties together or by an authority, but also against the one selected by one party only. This is to avoid the undesirability of the arbitrator appointed by either side considering himself the advocate of such party. The proposal of the Committee omits this idea, probably owing to the supposed hopelessness of being able to achieve any improvement of this practice, which nevertheless is generally condemned.

Arbitration has been used in Sweden from of old to no inconsiderable extent. This is probably chiefly due to the fact that the procedure of the Swedish law courts has long functioned all too slowly. A new law relating to judicial procedure is, however, being worked out, and when it reaches full application, this fault in the State tribunal activities should be largely remedied. But the feeling will doubtless still remain within the commercial world that, particularly in cases of a more technical nature, where special mercantile experience or technical knowledge is of particular importance, a procedure carried out by persons better equipped in these respects than the State judges can always be expected to be, is to be preferred. It is interesting to note, however, that it is stated in authoritative quarters that the parties are not always disposed to leave the decision entirely to non-lawyers. True, they consider it necessary that business men or technicians should be members of the court, but it has not seldom been found hazardous to leave the decision to them alone. There is a certain security in the fact that principles of law may not be entirely set aside in favor of an "amiable composition". The correctness of these assertions is contested in other quarters, but it will hardly be possible to deny that the danger of unreliable decisions nevertheless exists.

There are three permanent arbitration institutions of importance in Sweden. The first and most prominent—particularly as regards the importance of the disputes settled by its assistance—is the Swedish Technical-Industrial Institute of Arbitration

(Sveriges Tekniskt-Industriella Skiljedomsinstitut), which is primarily intended for disputes as to agreements made by industrial concerns. It is, however, open to all commercial-judicial controversies. The Institute consists of a Council and a secretary, as well as accredited delegates elected by the larger industrial and commercial associations in the country, who superintend the activities of the Institute and appoint its Council. When the assistance of the Institute is requested in establishing a Court of Arbitration, the Council appoints three arbitrators, of whom the chairman is a legally trained person with practical experience in the handling of legal disputes, and two members calculated to be able to judge the facts of the case in question.

The second institution, which has been set up by the Stockholm Chamber of Commerce, consists of a Council of a maximum of 100 persons, consisting exclusively of business men. When the Council is resorted to, its executive committee from among the members of the Council appoints three arbitrators and two deputies, all well acquainted with the special field of business in dispute. If the three ordinary arbitrators cannot agree on a decision, the Court of Arbitration is reinforced by the two deputies. The arbitrators are assisted by the legal secretary of the Council.

The third institution is the Swedish Board of Arbitration for the Grain and Fodder Trades (Sveriges Skiljenämnd för Spannmåls—och Foderämneshandeln). It functions in about the same manner as the Arbitration Councils of the Chambers of Commerce, except that the arbitrators are appointed by the Chairman of the Board. This Arbitration Board has been of great importance, and even if its activities have now somewhat declined, since the grain trade in Sweden has been subjected to extensive state regulation, the Board is still largely resorted to. The legal element is represented by a secretary, who assists the Board of Arbitration with information, *inter alia*, in legal matters.

In the Swedish Railway Traffic Regulations it is stipulated that in the event of dissatisfaction with the decision of a railway as to the refund of freight, or regarding indemnity for loss of or damage to goods, or if the period for delivery is exceeded, the dispute shall be settled by arbitration. Each party appoints an arbitrator. The third arbitrator, who shall be chairman of the court, is appointed by some authority mentioned in the regula-

tions; is appointed each time for a period of one year; and shall have the competence of a judge and preferably be actively engaged in that capacity.

Most arbitrations in Sweden are those where the parties do not apply to any permanent institution for assistance in appointing arbitrators, but where they are chosen by the parties, *i. e.*, in reality by their lawyers. Here it is the rule for at least one of the arbitrators to be a lawyer, not seldom a judge.

Opinions differ as to whether confidence in arbitration procedure in Sweden has declined or not. I believe, however, that particularly since the improvements in the Law on Arbitration effected of late years, which aim, *inter alia*, at preventing obstruction from either party and at encouraging the nomination of impartial arbitrators, there is rather reason to believe that confidence has increased. This will probably be still more so, if as a rule there is appointed as chairman of the board of arbitration a lawyer with the training of a judge.

Arbitration clauses figure largely in agreements entered into between Swedes and foreigners. The boundary for Swedish arbitration procedure has been so drawn that if either or both parties to an agreement have their domicile outside of Sweden and cannot be summoned before a Swedish Court, the Swedish Law on Arbitration is not applicable unless, according to the agreement, arbitration is to take place in Sweden or a party otherwise acquiesces in this. The corresponding stipulation in the Law of 1929 as to Foreign Arbitration Agreements and Awards, embodies that every arbitration agreement implying that arbitration shall take place outside of Sweden is a foreign arbitration agreement, to which shall apply the arbitration laws of the country where the arbitration is to take place. If nothing has been said in the agreement as to the place where arbitration is to be held, the arbitration agreement shall be considered to be foreign, should both parties be domiciled outside of Sweden.

Awards made outside of Sweden are considered as foreign, even if the arbitration agreement, according to the rules just mentioned, may be considered as Swedish, and consequently the Swedish Law on Arbitration is to apply as regards the agreement. Special provisions apply to the enforcement of foreign awards in Sweden, given chiefly in conformity with the 1927 Convention. Application for such enforcement must be made to the Svea Hovrätt (The Court of Appeal in Stockholm) which, if

the stipulated conditions for such enforcement exist, will decree accordingly. The enforcement of the award will then be effected in the same manner as in the case of a final judgment of a State court.

In the timber trade, Swedish exporters have usually submitted to arbitration in the purchaser's country. The same thing applies to woodpulp, with the exception of sales to Transatlantic countries (except the U. S. A.), in which cases arbitration shall take place in Sweden. The arbitration clause in the agreement of the paper exporters generally stipulates that the court of arbitration shall be located in the seller's country. In the agreement for the mechanical industry it is stipulated—even for shipments abroad—that disputes shall be settled by arbitration according to Swedish law and by arbitrators appointed by the Swedish Technical-Industrial Arbitration Institute (Sveriges Tekniskt-Industriella Skiljedomsinstitut). Similarly, disputes in the grain, fodder and seed trades, even when contracts have been closed with foreigners, are referred to the Swedish Board of Arbitration for the Grain and Fodder Trades. In the field of shipping, Stockholm, London and New York are agreed upon as the places of arbitration in some charter-parties; in others, the port of shipment or of discharge is stipulated, depending upon whether the dispute concerns rules in force at one or the other of those places.

That the arbitration agreement is Swedish does not imply that Swedish material law shall be applied in deciding the actual dispute. If there is any international point in the legal relations arising under the agreement—such as one party being domiciled outside of Sweden, or the agreement being fulfilled outside of Sweden or any other such circumstance that associates the agreement with the law of a foreign country—the question as to whether foreign law shall apply must be solved according to the rules of private international law, if either of the parties so demands. Naturally the parties are free to agree that the law of a certain country shall be applied to the actual contract in dispute, and this does sometimes occur. But to conclude, merely from the fact that the Court of Arbitration is to be located in a certain country, that the parties intended the law of that country to be applied, is not considered justified in Sweden.

As the Committee on Commercial Arbitration of the International Law Association particularly stressed in their report

to the Paris Conference of the I. L. A. held in 1936, there is a great need of international rules to remove the uncertainty as to the applicable law, which now leads to unsatisfactory results.

As regards the purchase of goods and chattels, international work has fortunately progressed far, both as regards international unification of the law on sale, and as regards which law of the different countries concerned should be applicable to the dispute in question. In the former respect we have the draft of an international law on sale, made by a committee appointed by the Rome Institute and sent by the League of Nations to the Governments of the various countries for expressions of opinion. It received approval and support of the Governments of the four Northern Countries. In the latter respect, a proposal has been made for rules of private international law as to sale of goods, drawn up by the Committee of Sale of the International Law Association and dealt with by the 1928 Hague Conference, on the initiative of the I. L. A. The proposal has subsequently been redrafted by a Committee appointed by the Conference.

No matter whether the more comprehensive or the more modest of these proposals gains the approval of the Governments, this will be a good means of remedying the inconveniences pointed out by the Arbitration Committee of the I. L. A. It may even be questioned whether, in the event of State regulation in this field being delayed too long, the proposals submitted might not be employed for arbitration procedure by making reference to them in arbitration agreements. In this way private arbitration activity would again accomplish pioneer work in the sphere of international law.

COMMERCIAL ARBITRATION IN CIVIL LAW COUNTRIES

BY

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1. *History.* The dualism in our modern legal systems of a jurisdiction of state and arbitral (private) courts is the product of a long historical development. In the earliest time litigation before a "court" was "essentially a private arbitration established under the approval of the State as a substitute for self-help, the business of the state officials being only to see that this arbitra-

tion was conducted in proper form ".[1] A judicial proceeding was, therefore, arbitral insofar as it was based on a voluntary submission by opposing parties to a judge and his decision, the judge deriving his judicial power, and the judgment its force, from this voluntary submission.[2] In the course of time, however, the requirement of voluntary submission as a basis for jurisdiction became no more than a fiction, and a " court " could act even where one of the parties, the defendant, was forced to litigate.[3]

When courts, which derived their jurisdictional power from the state, had once become established, purely private arbitration tribunals originated beside them, but these did not in all legal systems become equal rivals with the state courts. In Roman law, for example, agreements to settle future disputes by way of private arbitration were not binding. Furthermore, Roman law discriminated against agreements to settle disputes by way of arbitration by making them not fully enforceable. An arbitration agreement (*compromissum*) did not prevent any of the parties from beginning a law suit in the ordinary court, but the faithful party could recover from the party breaching the agree-

[1] Buckland, ROMAN AND COMMON LAW, 316 (1936); the leading study on the subject is that of Wlassak, *Der Gerichtsmagistrat im Gesetzlichen Spruchverfahren*, 25 Zeitschrift der Savigny Stiftung (Romanistische Abt.) 81. The arbitral origin of procedure accounts for the most characteristic feature of Roman procedure in the classical period, the division of the trial in two stages: the formulation of the issues before the magistrate, a state official, and the trial before the index, a private citizen who decided the issue in a very informal proceeding as stated in the pleadings. To obtain execution of this judgment the winning party had to go back to the magistrate. Buckland 318; as to the Greek law see Steinwenter, DIE STREITBEENDIGUNG DURCH URTEIL, SCHIEDSSPRUCH UND VERGLEICH NACH GRIECHISCHEM RECHT (1925). As to the old Germanic law see Von Amira, 2 NORDGERMANISCHES OBLIGATIONENRECHT 837 (1882-95), Heusler, DAS STRAFRECHT DER ISLAENDER SAGAS, 69 (1911). As to the English law see Cohen, COMMERICAL ARBITRATION AND THE LAW (1918) 53, Sayre, *Development of Commercial Arbitration Law* (1928), 37 Yale L. J. 595. See, further, Jones, *Historical Development of Commercial Arbitration in the United States*, 12 Minn. L. Rev. 240 (1928). In general see further Max Weber, RECHTSSOZIOLOGIE, 3 (2) GRUNDRISS DER SOZIALOEKONOMIK (2nd Ed. 1925) 416.

[2] Sohm-Metteis-Wenger, INSTITUTIONEN DES ROEMISCHEN RECHTS (17th Edition 1924) 644; Krause, *Entwicklungslinien des Deutschen Schiedsgerichtwesens*, 3 Nussbaum, INTERNATIONALES JAHRBUCH FUER SCHIEDSGERICHTSWESEN, 220, 222 (1931).

[3] *Cf.* Buckland, *op. cit. supra* note 1, at 316.

ment the penalty usually provided for—a result similar to the recovery allowed on the bond under the English law in the time of Lord Coke.[4] Justinian did, however, improve upon the status of awards by allowing a suit upon the arbitration award if both parties had assented to it either expressly by subscribing or impliedly by a failure to protest within 10 days after its rendition.[5] Medieval German law, taken as a whole, had a much more friendly attitude towards arbitration. It not only encouraged agreements to settle future disputes, but permitted either of the parties to prevent, by way of defense, any attempt by the other to bring an ordinary law suit. The contracting parties, too, had apparently complete freedom of procedure; they could determine whether the arbitrators were bound by the rules of substantive law or should decide in accordance with equity. The arbitration award was, moreover, enforceable like an ordinary judgment, and was not subject to appeal. During the 12th and 13th centuries arbitration tribunals assumed increasing importance in Italy, Germany and France. Courts of arbitration exercised their functions in all the great fairs of medieval Europe. But further development of arbitration tribunals was retarded in Germany by the "reception" of Roman law during the 14th century. Under the influence of modern Roman law, as developed by the Canon law, the law of arbitration in most parts of Germany, for example, underwent radical changes. A breach of an arbitration agreement was held to result only in damages. Awards were no longer enforceable like judgments, and they became subject to appeal. Furthermore, German law adopted the famous distinction, innovated by the great medieval authority on civil and criminal procedure, Durantis, between arbitrators bound by the rules of law and amicable compounders not bound by these rules. It was small wonder, then, that the importance of arbitration declined rapidly in Germany. This decline was furthered by legislation of the absolute states of Germany in the 17th and 18th centuries, which viewed arbitration tribunals as unwelcome rivals to the state courts, so that by the end of the 18th century, arbitration in Germany was used only in a few unimportant fields.[6]

[4] Vynior's case, 8 Co. 80a and 81b.

[5] Buckland, TEXTBOOK ON ROMAN LAW (2nd ed. 1932) 532.

[6] Krause, DIE GESCHICHTLICHE ENTWICKLUNG DES SCHIEDSGERICHTSWESENS IN DEUTSCHLAND (1930).

In France, where arbitration tribunals apparently never enjoyed such a free position as in Germany, there was no similar decline in the importance of arbitration; in fact, the legislation of the French Revolution favored the settling of disputes by way of arbitration. But a reaction to this friendly attitude set in with the introduction of the French Code of Civil Procedure of 1806, the provisions of which have governed arbitration in France in the main for more than 100 years and are still controlling in that country in non-commercial transactions and, to a lesser extent, in commercial transactions. The Code expressly limited the type of cases which were subject to settlement by arbitration; required the nomination of the arbitrators by the parties to the arbitration agreement; limited the binding force of the agreement to three months, within which period the award had to be rendered; reserved the principle of the binding force even of the rules of civil procedure, as well as the principle of the impeachability of the award by appeal, and, finally, prescribed that awards required an *exequatur* [7] for their enforcement. The jealous courts did the rest to hinder the development of arbitration by interpreting the codal provisions adversely to the interests of arbitration.[8]

A more favorable attitude towards arbitration was taken by the German Code of Civil Procedure of 1877 and its immediate predecessors, due to the demands of the representatives of mercantile organizations. Arbitration agreements with respect to future disputes were expressly allowed under that Code, and to make this possible the parties were not required to nominate arbitrators in their arbitration agreements. The difficulties which arose when one of the parties to an arbitration agreement tried to obstruct the agreement by failing to nominate an arbitrator were taken care of by a provision which permitted the other of the arbitrating parties to apply to the ordinary court for the nomination of a substitute. But the Code did not go as far as the French Code of Civil Procedure in providing for an appointment of the umpire by the ordinary courts in instances where the arbi-

[7] French Code of Civil Procedure, arts. 1003-1028; Landrau, L'ARBITRAGE DANS LE DROIT ANGLAIS ET FRANCAIS COMPARES 12 (1932).

[8] See the famous decision of the *Cour de Cassation* of July 19, 1843, S. 1843, 1, 561, which limited the validity of an arbitration agreement to existing controversies. Prudhomme, *The Present Position of the Arbitration Clause Under the Law of France*, 1 INTERNATIONAL YEARBOOK ON CIVIL AND COMMERCIAL ARBITRATION 70, 71 (1928).

trators could not reach an agreement with respect to the umpire. However, the German Code of Civil Procedure abolished the binding force of the rules of ordinary procedure as well as substantive law and, what was, perhaps, even more important, restored the old Germanic idea that awards are not subject to impeachment. Yet, it should be remarked, the Code did not revive the other important principle of Germanic law, namely, the enforceability of awards like judgments.[9]

In this short survey of the historical development of arbitration, the development of only German and French law was considered, because these two legal systems have served as a model for the arbitration laws of most of the other civil law countries, including the Latin American systems. The French Code of Civil Procedure, especially, had "considerable influence upon the law of other countries without being instrumental, however, in advancing the cause of arbitration".[10]

Most of the modern statutes on arbitration are largely based on the assumption that there is only one type of arbitration agreement: the occasional and voluntary arbitration between two individuals entered into as the occasion demands. The arbitration statutes further assume, for the most part, that the only type of arbitration court is the temporary one, created solely for the settlement of an individual dispute. While these assumptions may have been true in 1806, in France when the French Code of Civil Procedure was enacted, they were no longer true in 1877 with respect to Germany, when the German Code of Civil Procedure was introduced, although the Code of Civil Procedure has no special provision with respect to the institutional courts of arbitration.[11] Since 1870, arbitration courts of an institutional and corporative character, created by various trade and business organizations, have become increasingly important. Arbitration in many situations is no longer based on a voluntary individual contract, but is forced upon many business men by the articles of the organization to which they belong. There is a growing

[9] Krause, *supra* note 2, at 236.

[10] Lorenzen, *Commercial Arbitration—International and Interstate Aspects*, 43 Yale L. J. 716, 721. As to the Latin American Law see Obregon, LATIN AMERICAN COMMERCIAL LAW 798 (1921).

[11] German Code of Civil Procedure, § 1048, disposes of those courts by declaring the rules as to temporary courts applicable. Some of those courts are, however, regulated by special statutes.

tendency, moreover, to extend the powers of those corporative arbitration tribunals, even to litigations with persons outside the association, by way of arbitration clauses incorporated in the standard contracts used in the particular trade. In view of this situation there is the danger of an abuse of economic superiority by one of the contracting parties.[12] In general, the various arbitration statutes do not remedy this defect, since they are based on the liberalistic philosophy of complete freedom of contract and the protection of the economically weaker party is left with the courts, which may intervene by declaring an agreement void as contrary to public policy.[13]

A similar problem has arisen with respect to the enforcement of international arbitration agreements in interstate trade. Here the nationals of the less powerful nations are often put at a disadvantage by arbitration clauses forced upon them by the economically stronger party to the agreement and which oblige them to submit to the jurisdiction of a foreign arbitration court, the composition of which they cannot influence. Because of the fear that these clauses strengthen the position and the influence of the economically stronger nations, there is a strong resistance against their enforcement in some countries. Thus, the great number of arbitration clauses providing for the jurisdiction of English courts of arbitration in contracts made with Italian subjects has probably been one of the reasons for the not too favorable attitude of the Italian legislature and Courts toward international arbitration,[14] an attitude which has changed, however, since the ratification of the Geneva Protocol on Arbitration Clauses.[15] These difficulties are eliminated to some extent if the

[12] Krause, *Die Staendigen Schiedsgerichte im Entwurf der neuen Zivilprozessordnung* in Rechtswissenschaftliche Beitraege 73; Mathies, DIE STAENDIGEN SCHIEDSGERICHT DES HAMBURGER GROSSHANDELS (1921); Vulliemin, DE L'ARBITRAGE COMMERCIALE (1931).

[13] See, however, German Code of Civil Procedure, 1025 (2), in force since 1933.

[14] Nussbaum, *Problems of International Arbitration*, 1 INTERNATIONAL YEARBOOK ON CIVIL AND COMMERCIAL ARBITRATION. As to the Italian law see Ascarelli, *Arbitration under Italian Law*, 1 INT. Y. B. ON CIVIL AND COMMERCIAL ARBITRATION 79 *et seq.* (1928); Lorenzen, *supra* note 10, at 747 *et seq.*; see further Bulletin of the Société de législation comparée (1923) 345 *et seq.*

[15] The Geneva Protocol, which has been ratified by nearly all of the continental countries and Great Britain, attempts to facilitate international arbi-

arbitration tribunal to which the parties submit is created on a true international basis, as is, for example, the tribunal of the International Chamber of Commerce, or on a regional basis, as provided in some international treaties concerning arbitration.[16]

2. *The Arbitration Agreement.* The most important effect of an arbitration agreement under modern continental law is that it provides the legal basis for an award, the parties binding themselves to comply with an award rendered in accordance with the agreement. As a negative effect an arbitration agreement excludes the jurisdiction of the ordinary courts and any court action brought in violation of the agreement will, as under English law and the modern American arbitration statutes, on motion be stayed or dismissed for want of jurisdiction of the ordinary court.[17] This is true even where the arbitration agreement confers jurisdiction upon a foreign arbitration tribunal.[18] These effects of the arbitration agreement have raised issues as to its classification as a matter of procedural or substantive law—a question which has been so widely discussed, particularly in Germany and Italy. The question is not without practical importance, for instance, in the field of conflict of laws relating to arbitration. If the relationship is to be classified as procedural, the validity of an arbitration agreement, for instance, is to be governed by the *lex fori*; if it is part of the substantive law the validity of an arbitration agreement is determined by its proper

tration in civil and commercial matters by providing for the recognition of arbitration agreements with respect to existing as well as future disputes. For further details see Lorenzen, *supra* note 10, at 750, 751.

[16] Nussbaum, 1 INT. YEARBOOK ON CIVIL AND COMMERCIAL ARBITRATION 1, 2. No arbitration agreement, in the proper meaning of the term, is said to exist when only certain incidental points of a decision, such as an appraisal, are submitted to an arbitrator. Such an agreement is not governed by the rules relating to arbitration. Germany, Mittelstein, *Law and Practice of Arbitral Tribunals in Germany*, 1 INT. Y. B. ON CIVIL AND COMMERCIAL ARBITRATION, 33, 34; Italy, Ascarelli, *supra* note 14, at 94.

[17] France, Landrau, *op. cit. supra* 7 at 52; Germany, Code of Civil Procedure, § 274; Geneva Protocol on Arbitration Clauses of September 24, 1923, art. 4. For further references see Lorenzen, *supra* note 10, at 724, note 48.

[18] Germany, 2 Gaupp-Stein-Jonas § 1025 VI, Geneva Protocol on Arbitration Clauses of September 24, 1923, Art. 1, 4. For the American law on this point see Sturges, COMMERCIAL ARBITRATIONS AND AWARDS § 475 *et seq.* (1930); see further *Gilbert* v. *Burnstine*, 1931, 255 N. Y. 348, 174 N. E. 706; *Mittenthal* v. *Mascagni*, (1903) 183 Mass. 19, 66 N. E. 425, 60 L. R. A. 812.

law, i. e., the law with which it has the closest connection (either the law of the place of contracting or performance).[19] The modern tendency on the continent favors the treating of questions relating to the validity and the formalities of arbitration agreements as belonging to substantive law, not much weight being given to the fact that the provisions relating to arbitration are not to be found in the civil codes but in the codes of civil procedure which contain many compulsory provisions with respect to such agreements.[20]

Under the prevailing view, issues relating to the capacity of parties and intrinsic validity of arbitration agreements are governed by the rules relating to ordinary bilateral contracts.[21] The German Code of Civil Procedure expressly provides since 1933 that an arbitration agreement is invalid if one of the parties has abused his economic or social superiority to force the other party to submit to the arbitration agreement or to provisions in an arbitration agreement which give the stronger party an advantageous position in the arbitration proceeding (particularly with regard to the nomination of arbitrators).[22] Arbitration agreements, it should be noted, are no more revocable than ordinary contracts. Most legal systems, however, take into account the importance of arbitration agreements as compared with simple contracts by prescribing the observation of certain formalities. Thus, usually, the agreement has to be reduced to writing in order to bind the parties.[23]

[19] Lorenzen, *supra* note 10, at 751 *et seq.* The Geneva Protocol on Arbitration Clauses does not specify which law should determine the validity of arbitration agreements. It provides only that the arbitral proceedings are governed by the law of the country where the arbitration is to take place unless the parties have stipulated otherwise.

[20] Germany, Reichsgericht Nov. 8, 1882, 27 Gruchot 1053; Mittelstein, *Law and Practice of Arbitral Tribunals in Germany*, 1 INT. Y. B. ON CIVIL AND COMMERCIAL ARBITRATION 33, 39; France, Cass. July 9, 1928, D. 1928, 1, 131; Landrau *op. cit. supra* note 7, at 26, 35.

[21] As to the capacity of minors and married women, see Lorenzen, *supra* note 10, at 724. Doubtful questions arise with regard to the validity of an arbitration clause contained in an otherwise invalid contract. The German courts distinguish whether, under the interpretation of the contract, the arbitral court has to determine the validity of the contract or not. Mittelstein, *supra* note 20, at 36. See further Code of Civil Procedure, § 1037.

[22] § 1025(2).

[23] Some countries require a document in writing signed by both parties, so Poland, Code of Civil Procedure, art. 487. In other countries an exchange

With respect to the scope of arbitration agreements, the provisions of the various laws differ widely. Many legal systems follow the German law and allow agreements with respect to future disputes, provided they refer to controversies arising from a certain definite legal relationship, such agreements being as irrevocable as one relating to an existing controversy.[24] To secure this irrevocability the parties to the arbitration agreement need not file it with a court or deliver it to one of the arbitrators, as they are required to do under some of the American arbitration statutes.[25] The French law, on the other hand, as interpreted by the courts, followed, until recently, the Roman law tradition in limiting arbitration agreements to the settlement of existing controversies. This was effected by extending to arbitration agreements with respect to future disputes the requirement that the agreement must designate the names of the arbitrators.[26] Since 1925, however, agreements relating to future

of letters is sufficient, so in Italy, Ascarelli *supra* note 14, at 80. In Germany no formalities were required for arbitration agreements until 1933. Under the peculiarities of the German contract law it could happen that an inexperienced party was held to have impliedly submitted himself to an arbitration agreement because a letter of confirmation of the other party had contained an arbitration clause, and the addressee had not protested against it. To prevent such a result the law was changed in 1933, and § 1027 of the Code of Civil Procedure, as amended, now requires an express agreement in a written document which must not contain any other provision not relating to the arbitration, but § 1027(2) qualifies the requirement of a writing by dispensing with this formality if both parties are merchants and the arbitration relates to a mercantile contract. In France an arbitration agreement has to be concluded before the arbitrators or before a notary public or in writing. (Code of Civ. Proc. art. 1005), Landrau *op. cit. supra* note 7, at 47. In many countries the requirement of a writing can be waived by the parties and is deemed waived if the parties proceed with the arbitration. In the Latin American countries arbitration agreements are required to be executed in a public instrument.

[24] Germany, Code of Civil Procedure, § 1026. Under this provision an agreement to settle all disputes arising from the business relation of the parties by arbitration would be invalid. For further details see Mittelstein, *supra* note 20, at 35. Italy, Ascarelli, *supra* note 14, at 81.

[25] California Code of Civil Procedure, par. 1283; Sturges, *Commercial Arbitration in the United States of America*, 1 INT. Y. B. ON CIVIL AND COMMERCIAL ARBITRATION 165, 174.

[26] Code of Civil Procedure, art. 1006, Cass. July 19, 1843, S. 1843, 1, 561. Since 1890, French courts under an exception in favor of arbitration contracts with regard to the settlement of future disputes, even if one of the parties was a French national, if the agreement was entered into in a coun-

disputes between merchants, bankers, and partners have been allowed.[27] But the innovation, even as far as it goes, is nevertheless defective because such an agreement is as yet not fully enforceable. Moreover, there is no provision which, as in German law,[28] provides for appointment of a substitute arbitrator by the court, should one of the parties refuse to participate in the appointment of the arbitrators. The courts in these cases have refused to grant specific performance against the defaulting party. The defaulting party is liable only in damages for breach of contract.[29]

3. *The Arbitrators.* The relationship between an arbitrator and the parties to the agreement is usually deemed to be based on a contract,[30] the arbitrator being under no obligation so long as he has not accepted the office. Under the prevailing view (at least in Germany) the contractual character of the relationship is not changed by the fact that the arbitrator is a member of a permanent tribunal and is designated by the president thereof; or that an organization, such as a chamber of commerce, is named for appointment of the arbitrators.[31] Each arbitrator, including the umpire, it is said, owes a contractual duty to both parties to the agreement and not alone to the party who has selected him.[32] Once an arbitrator has accepted his office he has to determine the case and is not allowed to resign, except for justified reasons; a violation of these duties makes him liable in

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try which recognized the validity of such contracts, even if the contract was to be enforced in France. Cass. June 21, 1904, 31 Clunet (1904) 888; Cass. req. Dec. 8, 1914, 43 Clunet (1916) 1218; Prudhomme, *The Arbitration Clause under French Law*, 1 INT. Y. B. ON CIVIL AND COMMERCIAL ARBITRATION 72 *et seq.* A further exception always existed under Art. 332 of the Commercial Code with respect to marine insurance.

[27] Law of Dec. 31, 1925, modifying art. 631 of the Commercial Code. Arts. 632, 633 define commercial contracts.

[28] German Code of Civil Procedure, § 1029(2).

[29] Landrau *op. cit. supra* note 7, at 110. All efforts to change the situation by way of amendment have as yet failed. Prudhomme, *supra* note 26, at 74. As to the availability of the remedy of specific performance in civil law countries see Lorenzen, *supra* note 10, at 725.

[30] Germany, Reichsgericht, Dec. 3, 1918, 94 RG 210; France, Landrau, *op. cit. supra* note 7, at 134 *et seq.*

[31] Mittelstein, *supra* note 20, at page 40.

[32] Germany, Reichsgericht, Nov. 29, 1904, 59 RG 247, 251.

damages, as some statutes expressly provide.[33] He has to render his decision with the same impartiality as a judge,[34] and since the function of an arbitrator is similar to that of a judge, he is answerable only for a wilful violation of his official duty in rendering an award [35] and may be rejected by a party for the same reasons which permit a judge to be challenged.[36] Arbitrators are not usually regarded as public officers, and need not qualify as such. It is usually sufficient that they possess legal capacity, and no discrimination is made against women or foreigners;[37] and only a few legal systems require legal training.[38] Frequently, statutory provisions provide for the appointment of an arbitrator or umpire by the court, should the party who has to appoint the arbitrator refuse to do so in due time or should the arbitrators fail to agree upon an umpire.[39]

Since early in the history of arbitration, the main problem regarding arbitrators has been whether they are bound by the

[33] Austria, Code of Civil Procedure, §§ 579, 584; Italy, Code of Civil Procedure, Intr. Ch. 2, art. 34; Germany, Reichsgericht, March 1, 1921, 101 RG 392. According to this decision an arbitrator may be sued to sign an award which has been agreed upon by the necessary quorum if he declines to do so.

[34] Germany, Reichsgericht, Dec. 3, 1918, 94 RG 210, 212.

[35] This is at least settled under the German law. Germany, Reichsgericht, February 8, 1907, 65 RG 175, Oberlandsgericht Hamburg, January 29, 1925, 8 Hans RG (1925) 364. Under the French law an arbitrator is not liable in damages if he was negligent in rendering the award, but the parties may appeal to the competent ordinary Court of Appeal, which may review the award on the merits. Landrau *op. cit. supra* note 7, at 130. As to the American law concerning the responsibility of arbitrators, see *Jones* v. *Brown* (1880) 54 Iowa 74, 6 N. W. 140; Sturges, COMMERCIAL ARBITRATIONS AND AWARDS, § 149 (1930). Concerning criminal responsibility, see Sturges, § 150.

[36] Germany, Code of Civil Procedure, §§ 1014, 378; France, Code of Civil Procedure, art. 1014, Caen, April 5, 1876, S. 1879, 2, 21; Italy, Ascarelli, *supra* note 14, at 84.

[37] Germany, Code of Civil Procedure, § 1032; France, Landrau, *op. cit. supra* note 7, at 136; Italy, Code of Civil Procedure, Intr. Ch. 2, art. 10, law of July 17, 1919; Ascarelli, *supra* note 14, at 81.

[38] Lorenzen, *supra* note 10, at 725.

[39] Austria, Code of Civil Procedure, § 582; Germany, Code of Civil Procedure, § 1029(2); the German law is defective insofar as it does not contain a provision authorizing the competent court to appoint an umpire if the parties have not agreed upon one and the arbitrators cannot reach an agreement; in such a case the arbitration agreement becomes invalid, § 1033(2). Mittelstein, *supra* note 20, at 39.

law or are free to follow their own sense of equity and justice. The famous distinction by Durantis between arbitrators and amicable compounders [40] is still made in many legal systems, the latter not being bound by the law, while the former are so bound, a distinction sometimes being made between the rules of procedural and substantive law.[41] Other legal systems follow the German pattern in eliminating the necessity for the application of "the law", except within certain limits said to be compelled by public policy.[42]

4. *Arbitration Proceeding.* The statutory provisions in the different legal systems vary greatly with regard to the rules governing arbitration proceedings. Usually only a few points of procedure are regulated by statutory provisions. Unlike the majority of the American arbitration statutes [43] the continental laws do not permit the arbitrators to subpoena witnesses or administer oaths.[44] Many statutes expressly prescribe that the parties shall be heard before the award is rendered,[45] although the parties may waive their right to such hearing. In the legal systems which follow the French pattern arbitration proceedings are governed by the rules of procedure for the ordinary courts unless the parties have agreed otherwise.[46] Under the German system, the parties may determine the rules of procedure; failing such agreement by the parties they are determined by the arbitral court.[47]

5. *The Award and Its Enforcement.* The most important practical question in this connection is that of the enforcement

[40] *Supra* p. 279.

[41] France, Code of Civil Procedure, arts. 1009, 1019; Italy, Code of Civil Procedure, Intr. ch. 2, arts. 17, 20; concerning Latin-America, see Obregon, *op. cit. supra* note 10, at 798.

[42] Germany, Code of Civil Procedure, § 1041(2); 2 Gaupp-Stein-Jonas, KOMMENTAR ZUR ZIVILPROZESSORDNUNG 15th ed. (1934) § 1034 1; but see Nussbaum, *Problems of International Arbitration*, 1 INT. Y. B. ON CIVIL AND COMMERCIAL ARBITRATION 20. As to the American law see Sturges, *op. cit. supra* note 35, § 218.

[43] Sturges, *supra* note 25, at 178, 180.

[44] Germany, Code of Civil Procedure, § 1035; in such a case recourse must be had to the courts. Code of Civ. Procedure, § 1036; Italy, Ascarelli, *supra* note 14, at 83; Lorenzen, *supra* note 10, at 726, 727.

[45] Germany, Code of Civil Procedure, § 1034(1).

[46] France, Code of Civil Procedure, art. 1009.

[47] Germany, Code of Civil Procedure, § 1034(2); Italy, Code of Civil Procedure, Intr. Ch. 2, art. 17.

of foreign awards. A discussion of the problems there involved is beyond the limit of this paper, which compares only the local laws relating to arbitration and does not purport to analyze questions of conflict of laws.

The various legal systems differ widely in the technical details relating to the formal requisites of an award and the conditions under which it becomes effective. There is no need to give these details here. A majority vote determines the decisions.[48] As a rule the award has to be rendered in writing and dated and signed by the arbitrators and very often it has to contain their reasons, unless the parties to the arbitration agreement have waived such requirement.[49] To become effective some statutes require a copy of the award to be served on the parties and frequently the award has to be filed with the competent court.[50] As between the parties to the agreement, the award is conclusive and binding as to the issues raised.[51]

With respect to the impeachability of an award, the difference of attitudes, described above, between medieval French and German law is still alive. Many countries, following the French example, allow the remedy of appeal to the ordinary court against an award, unless the parties have expressly waived such right;[52] (for example by making the arbitrators amicable compounders). Other systems have adopted the German point of view and allow only extraordinary remedies by means of which the award may be vacated.[53]

[48] Germany, Code of Civil Procedure, § 1039.

[49] France, Code of Civil Procedure, arts. 1009, 141, 1016, 1020; Germany, Code of Civil Procedure, §§ 1039, 1041(5); Italy, Ascarelli, *supra* note 14, at 84.

[50] Germany, Code of Civil Procedure, § 1039; France, Code of Civil Procedure, art. 1020; Austria, Code of Civil Procedure, §§ 593, 594.

[51] Germany, Code of Civil Procedure, § 1040; France, Cass. req. May 31, 1902, S. 1904, 1, 23; Landrau, *op. cit. supra* note 7, at 214 *et seq.* Concerning the problem whether an award is to be considered as a judgment or as a contract, see Nussbaum, *supra* note 16, at 8.

[52] France, Code of Civil Procedure, arts. 1010, 1023.

[53] Germany, Code of Civil Procedure, § 1041. An award may be vacated for the same reasons as an ordinary judgment. §§ 1041(6), 580, for instance if one of the arbitrators was guilty of partiality, fraud, or corruption or one of the parties has committed perjury or forgery and the award is based on such testimony or forgery. The most important special ground for setting aside an award is illegality of the arbitration proceedings. § 1041(1).

We find the same lack of uniformity with respect to the enforcement of awards. Only a few systems treat awards like judgments and permit execution upon them without confirmation by a court. Most legal systems require nowadays a confirmation of the award by an ordinary court in some way or other. In some countries an action must be brought upon the award, in others a more summary procedure exists.[54]

Determination of the "Nationality" of an Award.* The Austrian Supreme Court recently had occasion to rule upon this general question: When and under what circumstances may an award be treated as an Austrian award or as a foreign award for the purpose of its enforcement in Austria?

More precisely stated, the Court was confronted with the following case: An award was rendered in Berlin by one Ignatz F. as sole arbitrator. Not only the arbitrator but also two of the three parties to the proceeding were Austrians; moreover, at least one of the three parties, at the time the arbitration agreement was entered into, was domiciled in Vienna. Furthermore, there was no allegation that, when the agreement was made, it was even contemplated that Ignatz F. might exercise his office as an arbitrator and render his award, not in Vienna, but in

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Such is the case when, for example, the arbitration agreement was invalid or the arbitral tribunal was not properly constituted. Furthermore, the award may be set aside if the defeated party was not granted a hearing or if no reasons are given for the award. § 1041(5).

[54] France, Code of Civil Procedure, art. 1020; Germany, Code of Civil Procedure, § 1042 a-d; Lorenzen, *Commercial Arbitration—Enforcement of Foreign Awards*, 45 Yale L. J. 39, 42 (1935).

* Decision of Supreme Court of Austria, September 18, 1935. (Reported in Rechtsprechung No. 1, January, 1936, p. 15.) Contributed to the JOURNAL by Dr. Emil v. Hofmannsthal, Vienna.

Prof. Arthur Nussbaum draws attention to the fact that on March 5, 1936, the Supreme Court of Austria handed down another decision upholding the theory of the above case. In this more recent case, reported in "Juristische Blätter" 1936, p. 349, the Arbitration Court of the Chamber of Commerce, Zagreb (Jugo-Slavia) rendered an award which one of the parties tried to have vacated by the Zagreb Court. The Court denied the motion, holding that under the agreement the Austrian Courts were to have exclusive jurisdiction. The Austrian Court, however, refused to vacate the award even under these circumstances, holding that to vacate a foreign award would be undue interference with decisions rendered in a foreign jurisdiction. [Ed.]

Berlin. As a matter of fact, the plaintiff maintained that, although the arbitrator had to take a trip to Berlin in connection with the arbitration, it was entirely unexpected that the award itself should be rendered in Berlin. From all these circumstances the Supreme Court concluded that the ordinary domicile of the arbitrator being Vienna, the award must be looked upon as an *Austrian* award, independent of whether or not the award itself was rendered at the time of the arbitrator's stay at Berlin. Since, however, it was not entirely clear from the facts of the case whether the arbitrator had his permanent domicile in Vienna, the case must be reversed and remanded to the lower court for further investigation in this respect.

It is settled law in Austria that foreign awards will not be vacated there, because it would be contrary to recognized principles of international law and would constitute an unjustified interference with the judiciary in other countries. But it is often a moot question whether the award sought to be enforced is, in fact, a foreign award. Of course, the intention, expressed or implied, of the parties must always be considered of primary importance in determining the "nationality" of an award. In the case here discussed the parties did not expressly mention that the award should be treated as an Austrian one; it was necessary, therefore, to induce the intention of the parties from the facts of the case.

The Supreme Court expressly repudiated the argument that it should be the *lex fori* of the place where the arbitration was held and not the law of the domicile of the arbitrator which should govern in the absence of an agreement to the contrary. Unless it is clear that the parties intended to obtain a foreign award and either expressly or impliedly authorized the arbitrator to go abroad for the very purpose of rendering the award, the law of the domicile of the arbitrator should determine the "nationality" of the award, particularly where two of three parties involved are also subjects of the country of the arbitrator's domicile.

Therefore, should the lower court find that the arbitrator's permanent domicile is Vienna, the award rendered by him will be treated as an Austrian award and consequently will be subject to review by the Austrian Courts.

RECENT NEW YORK SUPREME COURT DECISIONS

Filing of Counterclaim not Waiver of Arbitration. Plaintiff asserts that defendants have waived the right to arbitrate as provided in the agreement between the parties, because of defendants' counterclaim in their answer in the City Court action subsequently brought by plaintiff for money loaned. This counterclaim, it is alleged, sets forth a dispute which, under the agreement, is subject to the arbitration now pending. *Held:* Motion for order restraining defendants from proceeding further with arbitration denied. "In *Chapman-Kruze Corp'n.* v. *Jaffe* (239 App. Div. 795, 263 N. Y. S. 737, citing *Matter of Hosiery Mfrs. Corp'n.* v. *Goldston*, 238 N. Y. 22; *Nazy* v. *Arcas Brass & Iron Co.*, 242 N. Y. 97) it was held the interposing of an answer in a City Court action and asserting counterclaims did not constitute a waiver. Furthermore, it appears the motion seeks the very relief prayed for in the complaint and would result in a final disposition of apparently the sole issue presented." *Screen Broadcast Corp'n.* v. *Signer and ano.*, Sup. Ct. Spec. Term Pt. III, N. Y. L. J., April 6, 1937, p. 1698, Hammer, J.

Renewed Motion to Confirm Must Be Based on Facts Unknown at Time Original Motion Was Made. This motion is characterized by the moving party as one for leave to renew the latter's previous motion to confirm an arbitration award as well as the respondent's motion to vacate said award. Obviously, the petitioner may not renew a motion made by his adversary. Moreover, the additional facts set forth in support of the present motion for leave to renew should have been submitted originally. They are not facts which occurred subsequently, nor are they facts of which the petitioner was unaware at the time it moved for confirmation of the award and opposed the respondent's motion to vacate the same. Even if the motion is treated as one for reargument the petition may not succeed, for a motion for reargument is confined to the facts originally presented to the court and may not be granted on the basis of new facts. The petitioner had ample opportunity to present the facts now relied on in support of the motion to confirm and in opposition to the motion to vacate. Its failure to avail itself of that opportunity may not be corrected under the guise of a motion for reargument. The motion is accordingly denied. *Matter of Am. Cloak & Suit Mfrs. Ass'n. Inc.*, Sup. Ct. Spec. Term Pt. I, N. Y. L. J. February 2, 1937, p. 558-9, Rosenman, J.

Rescission—Arbitration Clause Remains Valid Until Contract Is Rescinded. Plaintiff claims he was induced by fraud to enter into an employment contract containing an arbitration clause. As a part of that contract he delivered to defendant $1,000. He has sued in equity to rescind, and also sues for the value of his services while employed. *Held:* Motion for a stay of the Municipal Court action granted. When a contract is obtained by deceit it is void *ab initio* as soon as it is set aside. Until the contract is declared void it remains valid and the arbitration clause is part of it. The action in the Municipal Court is stayed until the contract is set aside. If it is not set aside plaintiff must go to arbitration. *In re Mickey Frocks, Inc.*, Sup. Ct. Spec. Term Pt. I, N. Y. L. J., March 6, 1937, p. 1136, McLaughlin, J.

Instituting Action at Law as Waiver of Arbitration. The complaint in the action now pending seems to be concerned with the same matters as are claimed to be involved in the contemplated arbitration proceedings. The plaintiff may not bring a court action and then, upon meeting obstacles therein, turn to arbitration machinery which he originally chose to disregard. *Held:* Motion to compel arbitration denied. Following *Zimmerman* v. *Cohen*, 236 N. Y. 15. *In re Wasserstein* (*Wholesale Dry Goods Employees' Union and Irving Textile Corp'n.*) Sup. Ct. Spec. Term. Pt. I, N. Y. L. J. May 11, 1937.

Scope of Arbitrators' Authority. The agreement between the parties provided that " customers whose business has been definitely ascertained to be lost to Corporation shall be eliminated in the allocation. If the parties hereto cannot agree upon the allocation of customers to the respective parties, such allocation shall be determined by arbitration in the manner hereinafter provided." To the extent that the award of arbitrators attempted to deal with the question of delivery to the respective parties of records affecting the allocated customers and also the delivery of records relating to customers whose business had been lost, the arbitrators exceeded their powers. It is true that the agreement provides that " all records pertaining to customers thus allocated to the retiring party shall be delivered to him." But the question of whether this provision is to be enforced and under what circumstances is not within the scope of the arbitration clause and is, therefore, one to be determined by the court. The arbitrators were without power to make any directions regarding the delivery of the records. Motion to vacate granted to the extent of modifying award by eliminating the portions thereof which relate to the delivery of records affecting allocated or lost customers. Motion to confirm granted only to the extent of confirming same as modified by the cross-motion. *Tierney* v. *James, Jr.*, Sup. Ct. Spec. Term. Pt. I, N. Y. L. J. May 29, 1937, p. 2721, Rosenman, J.

Other recent decisions of interest:

Scope of Arbitrators' Authority Under Arbitration Agreement. The plaintiffs and defendant were brothers who owned the capital stock of the Riviera Beach Development Company in equal proportions. They entered into a written agreement, relating to their exercise of an option for the purchase of the interest of the stock of that corporation and also the stock of the Sunset Beach Development Company, and providing for arbitration of any dispute " which might arise as to their respective rights and interests under the agreement or in the two companies." Subsequently, the parties submitted to arbitration certain questions of indebtedness and compensation which arose from their relationship to these companies. As a result of the second of these arbitrations the defendant's employment by the companies was terminated. In December, 1935, the plaintiffs, without the assent of the defendant, submitted the following questions for arbitration:

> " 1. Whether the defendant should use his residence or any other building at Riviera Beach (or at Sunset Beach) to transact his general real estate brokerage business.

"2. Whether the defendant, except with the consent of the two Development Companies, should act as real estate broker or agent for the sale or rental of property at Riviera Beach and Sunset Beach not owned by either of those corporations.

"3. Whether the defendant should be permitted to acquire property at Riviera Beach or Sunset Beach, not owned by either of the two Development Companies, to be used for any purpose other than as a residence for the defendant and his family."

The defendant did not participate in the hearing before the arbitrators. An award was rendered in favor of the plaintiffs and they sued to enforce the award. The defendant interposed the defense, which was sustained by the lower court, that the questions submitted to arbitration were beyond the scope of the arbitration agreement, so that the award rendered was void. *Held:* affirmed. Said the Court of Appeals: "This court has repeatedly said that, as arbitrations are intended to compose disputes in a simple and inexpensive manner, whenever the parties to one have had a full and fair hearing, the award of the arbitrators will be expounded favorably and every reasonable intendment made in its support." But—the court continued—even in view of this liberal construction an award cannot be upheld which clearly adjudicates matters beyond the scope of the arbitrators' authority under the arbitration agreement. The court also rejected the plaintiffs' contention that the question of the scope of the arbitration agreement as such was to be conclusively determined by the arbitrators themselves. *Pumphrey et al.* v. *Pumphrey*, 191 Atl. 235, Ct. A. Md. 1937.

Oral Arbitration Agreement—What Constitutes An Award. In an action at law to enforce an alleged award, the plaintiff established that there had been an oral arbitration agreement to submit certain disputes concerning a stockbroker's commission to arbitration. The arbitrators met, the controversy was heard and the following "award" rendered: "It is agreed that the commission of 5% for the sale of farm by Batchelder & Brown for E. A. Coffin and wife, which is $450.00, should be paid by said Coffin at once. In case payment is refused and if not paid in thirty days after demand is made, Mr. B. C. Reynolds, who is on the commission note, is to pay said commission of $450.00 upon demand of said Batchelder & Brown. Said farm was sold by Batchelder & Brown for said E. A. Coffin to the United States Government, and was in the town of Bolton, Vermont. That is the decision of your arbitrators (*sic*) John J. Flynn and Fred B. Howe."

The defendant objected to the introduction of this document in evidence on the ground that it was not an award of the arbitrators, but only the report of an agreement between them, which was not enforceable as an award. The lower court held that no action could be brought on the alleged award since it was lacking every requirement of a valid award. *Held:* reversed. Although the document was inartistically drawn, this does not affect its validity as an award. An award is to be liberally construed and every reasonable intendment is to be made in its support. The phrase "it is agreed" does not import a contractual undertaking between the arbitrators but is an expression of the coincidence of their opinions upon the merits of

the controversy. It is used in the sense in which we say that a jury is agreed upon a verdict, or that the members of a court are agreed upon the decision of a case. The concluding sentence, commencing "That is the decision", shows clearly that it was intended to make a final disposition of the subject matter of the dispute. *Batchelder & Brown* v. *Reynolds*, Vermont, 180 Atl. 884 (1935).

Signing of Award Terminates Arbitration Agreement—Arbiter Board. The parties agreed that any controversy which might arise with regard to certain work should be referred to three arbitrators. When a dispute arose, three arbitrators were appointed and, after hearing the evidence, the majority made an award in writing and certified to its correctness before a notary public. Two days later, one of the majority removed his signature from the award for the reason that the other arbitrator who joined with him had published the fact, before the time agreed upon, that an award had been made. *Held:* that the arbitrator's action was ineffective to revoke the award. The Court said: "The subsequent act of one of the majority in seeking to revoke his former agreement is explained only on the ground that he was piqued at the disclosure of the award to one of the parties by the other arbitrator. There is no charge of fraud or of mistake, and in the circumstances we think that, when the award was agreed to, signed, and acknowledged before a notary, the matter was at an end, and it was not permissible for either of the agreeing arbitrators to reopen or reconsider it. The arbitration agreement itself contained no provision for delivery of the award, and applying the test of intention on the part of the arbitrators, it is clear that when they separated on the evening in question they understood and agreed that as to a majority of them the award was final and conclusive." *Rust Engineering Co.* v. *Lehigh Structural Steel Co.*, 79 Fed. (2d) (C. A. D. C. 1935) 830.

Rehearing Cannot be Ordered When Time Prescribed by Parties for Making Award Has Expired. Upon application of one of the parties for an order of rehearing before the arbitrators after the time fixed in the arbitration agreement had lapsed. *Held:* The court's jurisdiction to direct a rehearing cannot be invoked. However, the appearance of the party and participation in hearings before the arbitrators after the date fixed for completion of appraisal and submission of briefs thereafter constitute implied extension of time for the making of the award. *Goerke Kirch Holding Co.* v. *Union County Circuit Court*, N. J., 185 A. 375, 1936.

Illegality of Arbitration Clause in Future Contract. A dispute had arisen between plaintiff and defendant concerning certain losses growing out of future transactions in grain on the Board of Trade of Chicago. Both parties were members of the Fort Worth Grain & Cotton Exchange, a private corporation which by its by-laws has a Board of Arbitration for the settlement of disagreements between its members in their dealings within the Exchange. A member who refuses to submit to and abide by such arbitration is subject to expulsion from membership.

The parties entered into a special arbitration agreement with regard to the controversy that had arisen out of their various futures transactions.

Subsequently, however, defendant declined to perform the award of the Board and plaintiff brought suit. Defendant's main defense was that the futures transactions were gambling contracts, forbidden under the penal law of the State of Texas and therefore void and unenforceable and that the subsequent arbitration agreement was likewise unenforceable, being tainted with the same illegality. The lower courts held that although the contracts in futures were void, this did not affect the validity of the arbitration agreement. *Held:* reversed. "It appears to be almost universally recognized that a claim arising out of an illegal transaction, such as speculation in futures, is not a legitimate subject of arbitration, and an award based thereon is void and unenforceable in the courts of the country. . . . A claim that cannot be made the basis of a suit cannot be made the basis of an arbitration. The mere submission of an illegal matter to arbitrators and reducing it to an award does not purge it of its illegality." *Smith* v. *Gladney* 89 S. W. (2d) 351 (Tex. Com. App.); revs'g. 70 S. W. (2d) 342 (Court of Civ. App.).

WALTER J. DERENBERG.

ON HUMAN RELATIONS IN LAW

"The relationships of law are the relations of one man to another and may be called legal relations. But the various human relationships do not enter, in their full extent, into the sphere of law, because the legal notion of a person rests upon an abstraction and does not embrace the whole being of man.

There must, therefore, occur much modification and subtraction before we reach the special relations which alone are involved in the idea of a law. Thus, suppose a man has arisen from a protracted illness and in order to pay the bill of his physician, to provide for the urgent wants of his family, due to his recent incapacity, and to procure the means of beginning business again, he goes to a well-disposed neighbor whom he has helped in former times and obtains a loan at the usual rate. How much of all this must we leave out in order to ascertain the purely jural relations between the parties. Compare with this the case of the rich man who borrows capital merely to add to his possessions by a new speculation and consider the effort of abstraction which is required in order to assimilate the resulting legal relation. And yet the legal relations in these two cases are identical."—*Puchta.*

Forged Letters of Credit. The story begins like a detective novel: On August 5, 1926, two individuals called at a bank of St. Sebastian (Spain) and presented two letters of credit issued by a South American bank, one for £3,250, the other for £1,000. The St. Sebastian bank had received from the South American bank due notice of the issuance of these letters, together with specimen signatures of the payees.

The latter demanded payment of almost the whole of their credit, £3,200 and £975 respectively. The St. Sebastian bank, considering that the letters were in due form, made no difficulties, entered the payments on the letters and returned them to the payees, as the credits had not been entirely utilized.

The next day, August 6, 1926, the same two individuals presented themselves at a Madrid bank figuring, like the St. Sebastian bank, among the establishments always indicated on letters of credit. They produced two letters bearing no mention of previous payments and withdrew, respectively, £3,200 and £950.

The day following, August 7, similar proceedings with a Barcelona bank resulted in payments of £3,150 and £950, respectively. Two days later, on August 9, the two individuals called at a Geneva bank with the same letters, still bearing no record of previous payments. One of them obtained £950 against the second letter, but when the other presented his letter, the cashier hesitated. He reflected that the object of a letter of credit is to enable a person to travel without liquid cash: why had these two persons, coming from South America, waited until their arrival at Geneva before drawing their money? Asking them to wait a moment, he went to consult the manager. When he returned, the individuals had disappeared. He then examined more closely the letter left in his hands and perceived by certain details that it was a complete forgery; there was no watermark and there were various mistakes in spelling and typing.

This led to the discovery that the two payees were experienced swindlers, who had obtained in South America two genuine letters of credit, which they had used as models for the forgery of a whole series of letters and had successively presented the

latter to several of the banks entered as payers on the original letters. Thus, with an initial expenditure of £4,250, plus travelling expenses and costs of forgery, they had succeeded in obtaining £13,375. They could thus flatter themselves that they had devised a paying business, which would have been still more profitable without the Geneva incident.

But how did this story of international swindling come to be raised at the Court of Arbitration of the International Chamber of Commerce? This is what we shall now see: The Madrid bank, which had paid £3,200 and £950 against the two letters, naturally endeavored to secure the reimbursement of these sums from the South American bank. Naturally also, the latter refused, accusing the Madrid bank of having committed an error by paying against presentation of a forged letter.

To which the Madrid bank rejoined that it was certain that the letters produced had been the *genuine* ones; that, if it had been shown the counterfeit letters, it would have immediately noticed the forgery and had the swindlers arrested; and that it could not be proved that it had made payments against forged letters, since it was a fact that two genuine letters had been issued. The Madrid bank therefore applied for arbitration.

The Court of Arbitration of the International Chamber of Commerce appointed for the settlement of this dispute a single arbitrator of a nationality other than that of either of the parties, namely, Mr. Maurice Hermans, barrister at the Belgian *Cour de Cassation*. In a remarkably argued award which, it may be said, has come to be regarded as the authoritative ruling in the matter, the arbitrator declared in favor of the Madrid bank. The main arguments of the arbitrator may be summarized as follows: [1]

1. The relations established between the bank issuing the letter of credit and the banks appointed to make the payments are those of principal and attorney-in-fact. The only notification of partial payment is that entered by the bank making such payment on the letter itself, which is returned to the payee, who accordingly himself transmits such notification to the other banks. It is the payee who is responsible for making a proper use of the letter. Otherwise, he violates the tacit contract existing between him and the issuing bank. Consequently, if it has committed no error, the bank that made the payment cannot be

[1] Anyone interested in a fuller account of the essential arguments advanced by the arbitrator may obtain them by writing to THE JOURNAL.

held to be liable in the case in point, since it had to accept a payee which it had not chosen and in respect of whom it had no information. Finally, the sole responsibility is vested in the issuing bank which has entered into a virtual contract with the payee.

2. Generally speaking, it is the custom with first-class banks to deliver letters of credit only to customers who are sufficiently known to them to justify their confidence.—RENÉ ARNAUD.

Prompt Shipment. While arbitrators need not, and as a general rule do not, give the reasons which lead to the making of their award, there are occasional instances in which knowledge of the line of reasoning followed by the arbitrators may be useful or helpful to the parties concerned or to the trade groups which they represent, in which event the arbitrators are justified in giving, and in such cases frequently do give, the basis of their decision.

Such a question arose in a matter involving the China fur trade, in which an American importer claimed that the Chinese shipper had not complied with a provision for "prompt delivery" in the contract for a shipment of Chinese weasels, required by the importer to supply his trade in a highly seasonable market.

The seller was notified on March 18 of the signing of the contract, and thereafter had four shipping dates available—April 1, 2, 12 and 15. Shipment was not made until April 12, and then on a vessel which was not due to arrive in the United States until two weeks later than the one sailing on the 15th.

When the buyer was notified on June 9 of the arrival of the merchandise, he claimed that the contract provision for prompt shipment had not been complied with and that he was, therefore, relieved from accepting the merchandise or entitled to an allowance to compensate him for late delivery.

Three arbitrators selected by the parties from the fur trade upheld the buyer's claim that the seller had failed to comply with this "vital provision" of the contract and that the shipper's "gross negligence with respect thereto resulted in serious delay in delivery of the merchandise and that such delay was a breach of the contract, which was thereby cancelled", and the seller's agent in the United States was ordered to retain the merchandise.

Accompanying the arbitrators' award was a memorandum giving their interpretation of the accepted meaning of the word

" prompt " in connection with the general procedure of shipping merchandise in their trade. Said the arbitrators:

> . . . It appears that in this transaction, the offer of prompt shipment was a very important factor in the consummation of the sale, and that in the course of the negotiations this meaning of the term was conveyed to the buyer.
>
> It is the judgment of the undersigned arbitrators that a shipper offering " prompt shipment " implies thereby that the merchandise is available to him in his market and obligates himself to prepare shipment in the least possible time, and to use, within reason, the most expeditious means of shipping the merchandise to its destination. No fine distinction can be made between the terms " prompt shipment " and " immediate shipment " when applied to ports such as Shanghai where sailings do not occur at short regular intervals, necessary for such a thing as immediate shipment. Shipment cannot be made sooner than by the first available steamer, and that may not be " immediate " but would be " prompt shipment ". . . .
>
> The Shipper's choice of the " Christine Maersk " for the shipment was certainly inexcusable, in view of the fact that the " President Hoover ", leaving three days later, was due two weeks earlier and more reliably so.
>
> It being the custom of the trade to use first class steamers and shipping routes for this kind of merchandise, the omission of specific instructions in the contract did not give the Shipper the privilege to use a slow steamer where first class steamers were available to him. In this case, having agreed to " prompt shipment ", he certainly obligated himself thereby to use the best means within reason of shipping the merchandise to its destination.

A 24-Hour Proceeding. In the import and export trade disputes frequently arise over goods of a perishable nature or at a time when the market for the goods is at its maximum height, and then speed becomes of the utmost importance, as is illustrated by the following case.

A New York importing firm purchased a quantity of Baku hats from a Chinese manufacturer, through the latter's New York agent. The shipment was delivered at the height of the selling season in the millinery trade, and a controversy arose concerning the quality of the goods, the importer claiming that they were not according to the specification of the contract. While the contract provided for arbitration, it mentioned no rules of procedure nor any agency to administer the proceedings. Each party selected an arbitrator and these two were to appoint a third. They were unable to agree upon a third arbitrator, and as a result of delayed settlement the market value of the goods was seriously threatened.

Application was made to the American Arbitration Tribunal on January 13 for arbitration under its Rules. A third arbitrator was chosen from the Association's panel and the necessary stipulation as to the use of the Tribunal Rules was executed, as well as a waiver of all time limits provided in the Rules, so as to expedite a hearing. A hearing was held and an award rendered on January 14, in which an allowance was made to the importer for part of the goods found by the expert arbitrators to be defective. The award was promptly complied with and the goods found their way into the market when their value was greatest.

In this case, this result was obtained because the parties and attorneys cooperated to secure immediate action and because the arbitration was held under established rules that needed no amendment nor changes during the proceedings.

CHARLES M. SCHWAB ON BUSINESS MEN AS ARBITRATORS

"This arbitration is a thing we must come to. I have all the respect for the courts. I have all respect for the great machinery of the law and the State, but I feel that it takes a real business man to decide a real business dispute. Honest men may have honest differences of opinion, but if I wanted someone to decide who was right and who was wrong I would select someone who was versed in the art of the business about which we had the dispute and not someone whom we had to educate to know which was right and which was wrong."

ACTIVITIES OF THE BAR

THE NEW YORK COUNTY LAWYERS' ASSOCIATION

THE Committee on Arbitration and Conciliation of the New York County Lawyers' Association is the oldest, continuously active arbitration group set up by a bar association in the United States, having been created in 1925. Generally speaking, the activities of the Committee may be said to spread in four directions: the arbitration and conciliation of disputes; the education of lawyers in the use of arbitration; the promotion of the practice of arbitration by members of the Association; research in arbitration along educational and practical lines; and relief of calendar congestion in the courts.

Under the first heading, the function of the Committee is the arbitration of disputes between lawyers or between lawyer and client, voluntarily submitted to the Committee by both parties. In 1935, the Association amended its By-Laws and removed a limitation formerly placed upon the type of matter that could be submitted to the Committee. Up to that time only disputes "in respect of compensation for legal services or the division of fees received or about to be received" could be arbitrated; now there is no restriction upon the type of matter that may be submitted. Members of the Committee act as arbitrators, without compensation, and the Committee may, when it deems it advisable, arrange for the conduct of the proceedings under the rules of any existing, responsible arbitration tribunal.

The Committee is one of the first legal bodies to take the view that the lawyer finds arbitration, not a handicap, but a new opportunity, and that the courts have not been deprived of their jurisdiction by the passage of arbitration laws. In its annual report for 1931, the Committee stated: "We believe that the practice of arbitration by lawyers offers one of the most lucrative opportunities of the future." Since that time the Committee has devoted much of its energy to making lawyers aware of the possibilities of the "practice of arbitration" as an adjunct to the practice of law.

Among the research projects instituted by the Committee in 1936 is a survey of instruction being given in commercial arbi-

tration in law and business schools and colleges, the first area to be surveyed being New York City. Another research project concerns the possible use of arbitration in condemnation and *certiorari* proceedings, with particular reference to two phases of the question: (1) whether or not a municipality or other subdivision of the state may consent to arbitrate a condemnation or *certiorari* proceeding under the laws of the state; and (2) whether or not such an arbitration would be permitted under the arbitration law and decisions of the courts. Both of these studies are in progress.

In the relief of calendar congestion, the Committee has taken an active part and has cooperated whole-heartedly with other agencies seeking to find a solution to a problem that is particularly pressing in New York City. In the early part of 1936, the Committee, through a direct appeal to every member of the Association, sought to extend their participation in these efforts by urging the cooperation of members along the following lines: (1) an examination of files to ascertain whether any pending cases could be expedited by arbitration, with the request that such cases be referred to the Committee; and (2) the submission of suggestions for the greater use of arbitration by lawyers and for overcoming obstacles or indifference to the use of arbitration by members of the bar. As a result of this appeal, 37 pending court actions were referred to the Committee for arbitration.

The Committee has also approved a proposal to set up, in the Supreme Court of the State of New York, machinery for arbitration and conciliation similar to that now available in the City Court and the Municipal Court. A sub-committee, consisting of Milton P. Kupfer (Chairman), James Madison Blackwell, George H. Engelhard, H. H. Nordlinger and Franklin E. Parker, Jr., has been named to consider the subject and report on ways and means of accomplishing that objective.—MOSES H. GROSSMAN.*

* Chairman, since 1930, of the Committee on Arbitration and Conciliation of the New York County Lawyers' Association.

INTER-AMERICAN COMMERCIAL ARBITRATION AND GOODWILL

PREPAREDNESS FOR PEACE

BY

MIGUEL LÓPEZ-PUMAREJO

Minister of Colombia to the United States; Vice Chairman, Inter-American Commercial Arbitration Commission

> We in the new world are fortunate indeed. We must insure a continuance of our happy situation. A start has been made. Today, as never before, the nations of the Western Hemisphere are joined together by an ever-increasing community of interests.
>
> It is no exaggeration to say that in a world torn by conflicting demands, in a world in which democratic institutions are so seriously threatened, in a world in which freedom and human liberty itself are at stake, the Americas stand forth as an example of international solidarity, cooperation and mutual helpfulness.

These are the words of President Roosevelt, broadcast in his message to the members of the delegation of the United States to the Conference for the Maintenance of Peace, on the date of their sailing for Buenos Aires. They not only constituted an auspicious send-off on an historical occasion, but they also have a deep significance as to the standing and leadership of the Americas in matters of peace and goodwill.

This leadership is an honor, but it is also a grave responsibility. It means that no menace to peace and friendship, be it large or small, may be overlooked and that every possible means for the friendly settlement of controversies must be provided.

The achievements of the 21 American Republics in the wider aspects of the maintenance of peace, namely peace between governments, are generally known. Less well known is the plan which the private business interests of these Republics are building up for the maintenance of commercial peace.

In former issues of THE ARBITRATION JOURNAL articles have appeared describing the organization and facilities of the Inter-American Commercial Arbitration Commission. It is not my intention to describe these in detail. Let it suffice to say that the Commission is set up as a central administrative organization, with local committees in each Republic; that it furnishes stand-

ard arbitration rules applicable in all of the countries concerned and maintains panels of arbitrators of a high standing and expert knowledge. It is ready to cooperate whenever it is called upon and it can be called upon in matters involving large or small amounts, or mere misunderstandings where no financial claim is involved.

The benefits that may be derived from such an organization are not even realized by the beneficiaries themselves, the large group of importers and exporters in the Americas, until they find themselves confronted with a controversy to which the age-old adage "the customer is always right" does not apply. Situations of this kind arise unexpectedly and under circumstances which rarely repeat themselves. A merchant may believe himself prepared for all emergencies; he may think that all necessary precautions have been taken to protect the particular business deal in which he is engaged and yet he may discover that by no stretch of imagination can he meet all hurdles which are in the way of international trade. The following case, where all parties to a business transaction appeared to have taken all reasonable precautions, may serve as an illustration:

In 1932 the Munson Line ship, S. S. Munargo, went on the rocks off the coast of Brazil and was wrecked. Among the many business houses which suffered losses as a result of this disaster was a New York cotton concern, whose situation was quite peculiar. The concern had sold merchandise, the approximate value being $5,000, to an importer in Buenos Aires. Under the contract the buyer was responsible for the marine insurance and the seller protected the sale with a credit insurance under his blanket policy. As it happened, while the S. S. Munargo was *en route*, the Buenos Aires importer went into bankruptcy. Accordingly, after the wreck, the marine insurance claim became part of the estate handled by the receivers for the importer. The New York concern claimed payment from the credit insurance company, on the ground that the Buenos Aires buyer had become incapable of making payment because of bankruptcy. The credit insurance company, however, replied that non-payment for the merchandise was not a direct result of the bankruptcy, since title to the merchandise had not passed to the Buenos Aires buyer, but that the loss of the merchandise was due to the shipwreck. Therefore, according to the credit company, the claim of the New York exporter would be against the receivers for the Buenos

Aires importer, against such portion of the marine insurance which would be released by the receivers.

Here was a situation for which no one was prepared. The New York firm could have sued in Buenos Aires and tried to collect from the receivers; but this would take, presumably, years and also would be an expensive proceeding. Or it could sue the credit insurance company; but it was in constant business connection with that company and did not want to impair a friendly relationship by bringing suit. The solution was resort to arbitration. The New York firm and the credit insurance company submitted their difference to one arbitrator, a prominent attorney, under the Rules of the American Arbitration Association, in New York. The receivers for the Buenos Aires firm did not need to be a party to the arbitration, since the matter submitted was whether or not the New York firm was entitled to credit insurance. The arbitrator awarded that the New York firm was entitled to its claim from the credit insurance company, but that it was to assign to this company its rights against the Buenos Aires firm regarding the marine insurance.

Notwithstanding the complicated nature of the matters submitted, the hearing took exactly one hour and five minutes and the cost to the parties was $50. It is apparent that there was here a substantial saving of time, money and goodwill, thanks to easily available and efficient arbitration facilities.

Arbitration is peculiarly adapted to the maintenance of goodwill in American trade routes. It is a voluntary proceeding and it is necessary for both parties to consent to submit a matter to arbitration. Such consent may be obtained in one of two ways: a specific consent to submit an existing dispute to arbitration, or a general consent (so-called arbitration clause) whereunder any and all controversies which may arise in connection with a contract will be referred to arbitration.

To those who wish to be prepared for commercial peace there is this difference between the two forms of agreement: an agreement to submit an existing controversy to arbitration is a remedy. It is applicable *after* a dispute has arisen and when it is, by the very nature of the existing dispute, more difficult to persuade the parties thereto to agree on anything. If the parties fail to agree to arbitration, the remedy is useless.

On the other hand, an arbitration clause in a contract is a preventive measure. The agreement to arbitrate is there *before*

it is needed and in many instances its presence alone leads to a friendly understanding, without the necessity for an arbitration.

It is, therefore, by far the more effective procedure to insert an arbitration clause in a contract. The Inter-American Commercial Arbitration Commission recommends a standard arbitration clause, which is being inserted in inter-American contracts with increasing frequency. It provides as follows:

> Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the Rules, then obtaining, of the Inter-American Commercial Arbitration Commission. This agreement shall be enforceable and judgment upon any award rendered by all or a majority of the arbitrators may be entered in any court having jurisdiction. The arbitration shall be held in ———— or wherever jurisdiction may be obtained over the parties.

In order to be prepared to derive the fullest benefits from this clause, it is desirable that the prevailing arbitration laws provide for its enforcement and irrevocability. At the present time this objective has not yet been attained. One of the most important functions of the Inter-American Commercial Arbitration Commission is, therefore, to promote the amendment of such arbitration laws, through the cooperation of its local committees. For instance, in Colombia, there is at present pending in the legislature an amendment to the arbitration law, which will make such clauses irrevocable and enforceable.

Meanwhile, however, there seems to be no reason why an arbitration clause should not be used immediately in inter-American contracts. In general, commercial legislation follows commercial practices. Legislation is, after all, a protective measure and not an incentive. The incentive for the use of arbitration clauses comes, and must come, from business interests and logically will be followed by the desired legislation. This has been the experience, for instance, in the United States, where arbitration clauses have been in use for a long time, while the first modern arbitration law, providing for the enforceability of such clauses, was adopted as recently as 1920, in the State of New York.

Honest business men, who enter into an arbitration agreement in good faith, respect it and an arbitration clause in their contracts will serve as a reminder of their willingness to settle their controversies amicably. It will also serve as an indication of business methods that are respectable. This is a very important

point which should not be overlooked, because the firm or man who is always proud and willing to expose individual trade practices will most likely find greater favor with a buyer, a seller or a banker.

President Roosevelt in his statement quoted above referred to a world torn by conflicting demands. Here is a method by which conflicting demands in inter-American business transactions may be eliminated. Through it the business interests of the Americas in preparing for commercial peace are making a real contribution to the maintenance of economic and political peace in the Western Hemisphere.

ACTIVITIES OF THE INSTITUTE OF INTERNATIONAL EDUCATION

The Institute of International Education was organized in 1919 under the Directorship of Dr. Stephen Duggan for the purpose of establishing in the United States an organization for the development of better understanding of the problems of other peoples. In 1929, the Institute undertook the development of a program of cooperation with the Latin American Republics. The following statement, prepared by the Secretary of the Latin American Bureau of the Institute, gives an outline of the work of this division and indicates its importance in the development of better understanding and friendly relations. [Ed.]

Realizing the growing necessity for expanding the inadequate educational and cultural relations between the United States and the republics of Latin America and aware of the lack of contact between educational organizations of the two Americas, the Institute, in 1929, undertook the development of a program of cooperation with Latin America.

One of our chief activities has been fellowship and scholarship aid to Latin American students, and the number of fellowships and scholarships for Latin American students, under the Institute's administration, has increased from one in 1929-30 to 22 in 1936-37. A total of 115 fellowships and scholarships have been granted to Latin American students by the Institute during the past eight years. These students have come from 15 different countries.

The Institute has tried to select qualified students from Latin America who can profit by the work given here, particularly in applied subjects like Engineering, Agriculture, Business Ad-

ministration, and Social Service. The Institute recently made a study of the present positions or activities of its returned Latin American fellowship holders and was amazed at the information brough forth. A student who had spent a year studying engineering in this country is now Chief Engineer at one of the largest broadcasting stations in Argentina; another is working in the Department of Public Works, responsible for matters of heating, ventilation and refrigeration of municipal buildings (both are teaching at their universities). A student who studied economic sciences is now technical expert in the Office of Economic Investigations of the Bank of the Nation. A student who studied agriculture is now Adviser to the "Comisión Nacional de Elevadores de Granos"; another is "Inspector Técnico de la Junta Reguladora de Industria Lechera" and is teaching in the School of Agriculture of the University of Buenos Aires. The students who came here to take advanced courses in English and in American Literature, or to study our educational methods, are now teaching in the best secondary schools and even in the universities. Practically all the students have published something or other since their return and most of them have given lectures on their American experiences.

From the point of view of inter-American understanding and goodwill, the Institute feels that the results are inestimable. The following extract from the report of one of the Chilean students of last year will serve as a convincing illustration:

> The year I have spent in this country has been very profitable for me, both in the field of my professional studies and in life in general. I have seen and learned quite a good deal about the United States; its well-organized public and private institutions, its democratic ideals, its progressive social trends and especially its people and their philosophy of life. All this experience here will help me to promote a better understanding between this great country and my own. I am glad to have had this great opportunity. When I consider that I have to teach at a University where students are a little suspicious concerning the so-called imperialistic aims of the United States, it seems invaluable.

In addition to the fellowships for a year's study in this country, the Institute has for the past four years cooperated in travel scholarships offered to the best three students in the English classes of the Institute Cultural Argentino Norteamericano. The contest is held every year and the three winners are given a free round-trip passage to New York (contributed by the Munson

Steamship Line). The Institute takes care of the entertainment of the students during the few weeks they are in this country.

The Institute has administered but five scholarships for Americans for study in Latin America—two for study at the normal school in Santiago, Chile, and at the University of Chile, two for study at the Summer Session of the University of Chile, offered by the Government of Chile, and one for study in Havana, Cuba, offered by the Principal of the Colegio Sánchez y Tiant there. It is hoped that a real exchange movement, such as exists with Germany, France and many of the other European countries, may in time develop from our Latin American scholarship and fellowship activity.

The Institute has, since the establishment of its Latin American Division, arranged for the visit to this country of three educational commissions:

In 1929, the Institute arranged for a visit by a group of 22 Argentine educators who remained in the United States for six weeks, studying educational institutions in Boston, Chicago, Washington, and the New York area. Visits were made also to libraries, museums, industrial plants and social service organizations. In Argentina this visit was sponsored by the Instituto Cultural Argentino Norteamericano, which organization received a great impetus from the visit. Upon the return of the group several of the teachers inaugurated a series of classes for the teaching of English at the Instituto Cultural. These courses have had a phenomenal growth, and attendance is now over 3,000. Another of the Instituto Cultural's prominent activities is the American Bookshop, in the establishment of which the Institute gave a great deal of assistance. (In 1934 a group of 17 Argentines arrived on a visit which was also sponsored by the Instituto Cultural Argentino Norteamericano and were looked after by the Latin American Division of the Institute.)

In 1930 a group of 12 Brazilian teachers made a similar visit to the United States for a period of five weeks. Since their return to Brazil the members of this delegation have been active in reforming certain aspects of education in their country.

In 1935 the Institute made arrangements for a visit by a group of six Chilean educators, headed by the Rector of the University of Chile. At the close of the Second Inter-American Conference on Education, which was held in Santiago in September 1934,

the Chilean educators were invited to visit most of the countries which had delegates at the Conference. The Institute was enabled to invite the group to extend its visit from Mexico to the United States for a month's stay.

The Institute has long felt the desirability of similarly sending a group of distinguished American scholars to the countries of Latin America. The movement might well begin with a visit of a small group of eminent scholars, men of affairs and business leaders who, because of their prominence, will give evidence of the regard in which Latin American civilization is held in the United States.

In February 1930, the Director was selected by the Department of State as one of five delegates to represent the United States at the Congress of Rectors, Deans and Educators held in Havana. In 1931, the Director spent five months in South America lecturing upon cultural conditions in the United States at the Universities of every country, except Venezuela and Ecuador, and before distinguished groups of laymen. Upon his return from South America, the Director prepared a series of articles on Latin American civilization which appeared in the *New York Times*. In 1934 his book, *The Two Americas, An Interpretation*, was published. The Institute has a Spanish edition of the following publications: "Guide Book for Foreign Students in the United States" and "Fellowships and Scholarships Open to Latin American Students for Study in the United States".

At the request of Brazilian scholars, the Institute organized a summer school for American students at Rio de Janeiro during the summer of 1929, with an attendance of 12 teachers and students. The school was continued during the summer of 1930 with an increased attendance, but was discontinued the following year because of insufficient interest in the project.

As a result of the Director's visit and upon the request of the University of San Marcos, the Institute undertook the organization of a summer school at the University during the summer of 1932 under the personal direction of Dr. Albert A. Giesecke, former Director-General of Public Education in Peru. Complete plans and a curriculum were developed and registration sufficient to insure the success of the undertaking had been received when, as a result of a revolution in Peru, the University of San Marcos was closed and the American Embassy in Lima advised against opening the summer school.

When visiting Brazil in 1931, the Director served in an advisory capacity in organizing the first teachers' college in Brazil. The college is under the direction of the University of Rio de Janeiro and bids fair to become a most important element in the Brazilian system of education. The Institute has been at various times requested to suggest candidates to fill teaching positions in the Latin American countries, as in 1932 for the Teachers' College in Rio de Janeiro, in 1933 for the School of Sociology and Politics in São Paulo, and in 1935 for the University of São Paulo, and in 1937 for the University of Panama.

During the past eight years the Institute has assisted distinguished Americans in the preparation of plans and itinerary to Latin American countries and has rendered a similar service to individual scholars from Latin America visiting our own country. Lectures in the United States have been arranged for the Chilean poetess, Gabriela Mistral; for the Peruvian historian, Dr. Victor Belaunde; for the Chilean journalist and writer, Mr. Armando Zegrí, and last year for the Cuban essayist and critic, Professor Jorge Mañach.

During the past eight years approximately 5,000 books and periodicals on all aspects of American civilization and culture have been purchased and forwarded to Latin American educational centers. These shipments have been sent as gifts to the Instituto Cultural Argentino Norteamericano and to its branch office at Córdoba; also to Rio de Janeiro (to the Bibliotheca Nacional), Lima (to the Library of the University of San Marcos) and to Santiago (to the School of Education of the University of Chile). In addition, in 1933, the Central Library of Education in Rio de Janeiro sent the Institute $800, and requested it to select and purchase from this sum a collection of books on various phases of American education. In January 1937, the Central Library of Education sent the Institute $1,008.66 for the purchase of additional books. Books are also constantly being purchased by the Institute from funds sent to it by the Oficina Bibliografica of the National University of Córdoba in Argentina. In the spring of 1936 the Institute cooperated in a plan to have American books sent to Rio de Janeiro for exhibition purposes. The books, numbering more than 350 on education, philosophy, psychology, government and sciences, were sent to the Brazilian Association of Education which displayed them and advertised the enterprise broadly. As large numbers of

Brazilians read English, even though they do not speak it, the exhibition met with a remarkable response.

The growing interest in inter-American affairs is demonstrated by the increasing volume of correspondence from all parts of Latin America and the United States requesting information, advice and assistance on a great variety of matters.

The Institute feels that the activities of its Latin American Division have contributed materially to the removal of much misunderstanding between the United States and the Latin American countries and believes that by increasing its activities it will become increasingly important as a link in the chain of goodwill and neighborliness now being forged to unite more firmly the Americas.

NOTES AND COMMENT

Endorsement by Mexican Committee. The April issue of *Finanzas y Contabilidad*, a monthly publication issued in Mexico City, carries an editorial on the Inter-American Commercial Arbitration Commission. The Editor of the publication, Dr. Roberto Casas Alatriste, is Chairman of the Mexican Committee of the Commission, now in process of organization and the editorial is part of the educational work of that Committee. It is quoted in part below:

> With the growth of commercial relations, the probability for an increasing number of differences between contracting parties also grows. Such differences, frequently, when they cannot be settled by direct explanation between the interested parties—a difficult matter when they are separated by long distances—find their way to the courts.
>
> In international trade when a party considers he has a rightful claim upon which he wishes to start suit in another country, or in which he needs to appoint a representative of his interests, the difficulties are well nigh insuperable and unless the amount involved is very high, resort is practically never had to such methods, the party preferring to take the loss, since it is practically impossible to reach results by way of litigation in a foreign country. Very naturally there is, therefore, a lack of confidence and of goodwill which, if repeated in various instances, may eventually become a barrier to the development of commerce between countries.
>
> However, business men proceeding in good faith, even though they may have opposing points of view and interests, do not need to resort to official tribunals in their search for justice, for it is enough to designate a person of standing and repute, recognized by both, in order to

submit to him the controversy, under an agreement to comply with his decision. This procedure, which constitutes the essence of arbitration, is less costly and easier than resort to foreign courts; and the American Republics, during the past two decades, have shown in their various international conferences their unanimous conviction that arbitration fosters peace and goodwill, which are the basis of commercial intercourse among nations. . . .

This whole movement has the authorization and cooperation of the Pan American Union, whose Governing Board is composed of representatives of all of the American Republics, located in Washington, whose Director General is Dr. L. S. Rowe and Assistant Director, a distinguished Mexican, Dr. Pedro de Alba, former Senator and former Director of our National Preparatory School.

It is unquestionable that arbitration offers a guarantee for all those who are engaged in foreign trade and is an important element in establishing a feeling of solidarity among nations.

Argentine-Brazilian Cultural Relations. The promotion of cultural relations between the American Republics is becoming increasingly important and one of the outstanding factors in the development of such relationship is the exchange of students. Plans for such an exchange between Argentina and Brazil are now pending, through the proposed establishment of an Argentine-Brazilian Cultural Institute. The better understanding resulting from such exchange arrangements creates a sound basis for commercial peace.

Institute of Public Affairs Studies Inter-American Relations. The University of Virginia has included in several sessions of its Institute of Public Affairs the subject of Inter-American Relations. This subject has a prominent part in the 1937 session and the following discussions are included in the program: Certain Bases for Collective Security, by Dr. Arthur Deerin Call, Secretary, American Peace Society; Influence of the American Institute of International Law on Inter-American Relations, by His Excellency, Sr. Dr. Pedro Martinez Fraga, Ambassador of Cuba to the United States; Pan Americanism and the Buenos Aires Peace Conference, by His Excellency, Sr. Dr. Francisco Castillo Najera, Ambassador of Mexico to the United States; The Value of an Inter-American League of Nations, by His Excellency, Dr. Don Andres Pastoriza, Minister of the Dominican Republic to the United States; Advancement of Peace through Education, by His Excellency, Sr. Dr. Hector David Castro, Minister of El

Salvador to the United States; the Rights of Women in Inter-American Relations, by Miss Doris Stevens, Chairman, Inter-American Commission of Women; and Development of Commercial Arbitration in the United States and Latin American Countries, by Herman G. Brock, Acting Chairman, Inter-American Commercial Arbitration Commission.

Arbitration in the Argentine. The existence of a standing arbitration committee and easily available facilities in themselves frequently bring about the settlement of controversies, without the necessity of resort to formal arbitration. This is again proved by the 18th Annual Report of the Chamber of Commerce of the United States in the Argentine Republic. The Arbitration Committee of the Chamber, composed of Messrs. J. D. Twiney, Chairman; C. T. Brady, Jr., John Backer, J. F. McCarthy, W. B. McDavid, F. B. O'Grady and C. H. Minor, reports that no controversies were submitted for arbitration during the past year.

International Law Association Questionnaire. In 1930, when the International Law Association met in New York, it passed a resolution establishing the principle that in order to safeguard the security of transactions in international commerce, it is necessary that agreements between governments be entered into to regulate the essentials of arbitration practice and procedure between the nationals of their respective countries and to provide for the reciprocal enforcement of arbitration agreements and awards, provided the arbitrations have been conducted under institutions of high standing and which possess the necessary facilities.

At the Paris Conference, in 1936, the Committee on Commercial Arbitration recommended that cooperation between existing organizations shall be secured with the object of reaching the unification of rules in order to effect the uniform and reciprocal enforcement of arbitral awards in all countries; and that the various branches of the Association should be invited to contribute reports of the practice obtaining in their respective countries.

In accordance with this suggestion, a questionnaire is being submitted to branch committees for consideration. It contains 10 questions, briefly summarized as follows:

1. Do the usages of merchants considered as *lex mercatoria* still function as the law of your country, and is it in accordance with that law that merchants claim and exercise the right to stipulate in arbitration clauses, inserted in commercial contracts, that the law of a named country should regulate questions of difference, whether as to the construction or the performance of the contract, or incident thereto; and is it in accordance with the practice observed by merchants to revise the terms of a contract before signing it, and to require that the rules and regulations of a named trade association should govern the arbitration; also that the tribunal to determine a dispute should sit in a specified country?

2. By what law are the following regulated: construction of contract; performance; proceedings in arbitration, and particularly is any provision made for the speedy correction of an award on a point of law, or on a question of fact, and if so, whether by appeal to a trade tribunal or court of law?

3. Are trade associations established in the principal cities of your country to which contracting parties can refer the nomination of an arbitrator possessing requisite qualifications in place of each party nominating one arbitrator, they appointing an umpire?

4. On questions of whether bulk is in accordance with the sample, do trade associations provide for the prompt determination, without entailing upon the interested parties the cost and delay which an arbitration otherwise entails?

5. Do arbitrators act gratuitously; if moderate fees are payable, does any and what authority restrict the fees charged on an approved scale?

6. Has the definition of the terms *arbitration, equity* and *equitable* received attention by trade associations, to preclude a divergence of interpretation?

7. Does the law prescribe what rules of evidence are to be followed, and do courts assist to secure the attendance of witnesses by subpoena?

8. Is it requisite that an arbitrator shall state the grounds on which his decision is based?

9. Has attention been directed to the report issued by the Committee of Legal Experts to the Economic Committee of the League of Nations on the enforcement of foreign awards and is it proposed to meet the criticism which it presents?

10. Does provision exist for an arbitrator making his award on the documents submitted where the parties do not wish to appear?

The American Branch Committee has for its honorary president the Hon. Charles Evans Hughes; for its honorary vice-presidents, the Hon. William Nelson Cromwell, the Hon. Cordell Hull, the Hon. P. B. Mignauth (Atlanta), the Hon. John Bassett Moore; and for President, William J. Conlen (Phila.); and for vice-presidents, Phanor J. Eder (N. Y.), and Farnham P. Griffiths (San Francisco), with P. J. Kooiman as Secretary and Treasurer.

U.S.S.R. Foreign Trade Arbitration Commisson. In 1932 the Foreign Trade Arbitration Commission was organized. It consists of 15 members, appointed for one year by the President of the U.S.S.R. Chamber of Commerce from among representatives of trading, industrial, transport and other such organizations and from among persons possessing special knowledge in the domain of foreign trade. It is a Permanent Commission and

deals with disputes arising out of foreign trade contracts between foreign firms and Soviet trade organizations.

From this list of members, the parties choose their arbitrators who, in turn, select their umpires. As a rule, the cases are heard by a board of three—one arbitrator selected by each party and they in turn select the third arbitrator or umpire. The parties may, in cases involving no very complicated questions of fact or law, proceed with one arbitrator. In the event of a party failing to name an arbitrator or the arbitrators' failing to name an umpire within 15 days, the President of the U.S.S.R. Chamber may do so. The parties may, by mutual consent, leave the personal choice of arbitrators to the Commission.

The law gives effect to arbitration agreements in primary contracts that provide for disputes arising in the future. In presenting their case, parties who may be foreign citizens may defend their interests before the Commission, either through legal representatives, directors or technical assistants.

Awards are final, no appeal being permitted. The Commission is required to give reasons for its findings. The rules of procedure provide for the filing of the complaint, the sending of notices to the parties, the manner in which evidence is to be presented, etc., and must be approved by the President of the U.S.S.R. Chamber of Commerce. The Commission does not confine itself to examining and appraising the evidence produced by the parties, but, in accordance with the principles followed by Soviet jurisprudence, may collect proof on its own initiative. In other words, it may take an active part in the proceedings and elucidate, independently, points which it considers have been insufficiently established by the parties; and for this purpose experts may be called in on either questions of law or questions of fact. The experts may be either Soviet or foreign citizens. All conclusions of experts and all statements, documents and other matter, which have been submitted by one party, must be brought to the attention of the other party and the examination of evidence must be carried out in the presence of the parties or of their representatives. Awards which have not been voluntarily performed are enforceable through the People's Court, which issues an order of execution to the prevailing party and this order is turned over to the executive officer for enforcement.

The fees charged for arbitration cover the expenses of the proceeding, the maintenance of the Commission, summoning of

witnesses and experts, and are fixed by the Commission during the hearing. They may not exceed 1 per cent of the sum in dispute.

An example of cases coming before the Commission is the following: A Latvian dealer concluded two contracts with Automotoexport simultaneously, one for the sale by Automotoexport of one vehicle and the other for the sale of 12 vehicles. The first contract was cancelled by agreement between the parties. As Automotoexport did not carry out the second contract the dealer sued for breach of contract. The Commission carefully examined the case and ascertained the following facts:

The dealer undertook to explore the market in a certain country with regard to Soviet motor vehicles. With this aim the first contract was signed as a trial contract. This fact was admitted by the dealer in his statement to the Commission. Owing to the conditions obtaining in the country in question, it was not possible to send the vehicle there with an instructor. Consequently the parties agreed to cancel this first contract. The Foreign Trade Arbitration Commission found that as the trial contract could not be carried out, the second contract also lapsed and, therefore, rejected both the claim of the dealer against Automotoexport for breach of contract and the counterclaim made by Automotoexport.

London Chamber of Commerce. The Chamber is to the British Empire what the American Arbitration Association is to the United States in that it furnishes standards for the practice of arbitration and recommends rules of procedure which may be used in dominions, colonies, protectorates, etc. It also takes the initiative in improving or amending the arbitration law of England, which law serves also as a standard for similar legislation in these dominions, colonies, etc. It is the laboratory for research and the center of discussion of experiments and new ideas.

Here the comparison ends, for the Chamber has taken a leading part in the promotion of international arbitration and standards, of which the following may be mentioned:

(a) the appointment by Viscount Cave, Lord Chancellor, of the Mackinnon Committee in 1926;
(b) the passing of the Arbitration Act 1934;
(c) the selection of a representative to serve on the Arbitration Committee of the International Chamber of Commerce;

(d) the correspondence with the New York Chamber in 1913, eliciting their cooperation to secure the reciprocal enforcement of awards between Great Britain and U. S. A.;
(e) promoting the Geneva Convention of 1923 extending validity to arbitration clauses in commercial contracts and the later Convention of 1927 for the enforcement of foreign awards;
(f) the intervention of the London Chamber in the appeal to the New York Court of Appeals which resulted in the unanimous judgment of the American Court in support of the award in the arbitration before Sir James Martin in *Gilbert* v. *Burnstine & Geist.*

Although there are many other chambers of commerce throughout the British Empire that serve business, the most famous and best known is the Court of Arbitration of the London Chamber, which not only disposes of many controversies, but is the model for many other commercial organizations that administer or seek to establish effective tribunals.

Permanent Court of Arbitration, The Hague. The President of the United States has appointed Green H. Hackworth, of Kentucky, to succeed the late Elihu Root as one of the United States members of the Permanent Court of Arbitration. The other members are: John Bassett Moore (New York), Newton D. Baker (Ohio), and Manley C. Hudson (Massachusetts).

International Chamber Meets in Berlin. The Congress of the International Chamber of Commerce, to be held in Berlin June 28–July 3, 1937,[1] will include in its agenda consideration of the draft of a proposed uniform international law on arbitration drawn up by the International Institute at Rome for the Unification of Private Law. The basis for the Chamber's discussion will be the observations of its Committee on International Commercial Arbitration, which considered the draft at its meeting in Paris on February 26, 1937, and recommended certain amendments which, if approved by the Congress, will be submitted for adoption to the Rome Institute.

Canada Revises Licensing Regulations for Fruit and Vegetable Industry. The Canadian Department of Agriculture has revised the licensing regulations of the Fruit, Vegetable and Honey Act, under which a Board of Arbitration has been established to decide disputes between shippers and receivers. Before being put into

[1] This note was prepared prior to the date of the Berlin meeting. [Ed.]

effect the revised regulations were approved by the Canadian Horticultural Council, representing the producing-shipping interests, and the Canadian Fruit and Vegetable Jobbers' Association, representing the buying-distributing interests, both Dominion-wide organizations.

Under the revised licensing regulations a Board of Arbitration is set up at Ottawa, composed of three members, including the Chief of the Markets and Transportation Division of the Department of Agriculture as Chairman and one member nominated by each of the Associations mentioned. Complaints are filed with the Fruit Commissioner and are referred to the Board of Arbitration after full information has been obtained as to the claims of each party. Although the Board has power to administer oaths and hear witnesses, the intention is that matters will be decided upon documentary evidence.

The Regulations provide that the party against whom an award is given shall have 30 days in which to pay the award or to file protest, together with a certified check in the amount of the award, with the Department of Agriculture. If neither action is taken the party's license is suspended.

In the event of a protest, a civil suit, instituted by the party in whose favor the award is given, is necessary to determine the rights of the parties. In the absence of such a suit within the required number of days, the money is returned to the protesting party; only upon a decision of a court of competent jurisdiction is the money paid over to the other party in the face of a protest.

Plan for International Arbitration Union. A plan for the establishment of an International Arbitration Union to serve, mainly, the Danubian States, was recently prepared by the Arbitration Center of Hungary. This Arbitration Center, a joint organization of 196 corporations representing manufacturers, wholesalers, retailers and agricultural interests, has provided arbitration facilities for the past five years.

The plan, which has been sent to the trade and commercial organizations of the various countries concerned for approval or comment, provides for arbitration centers in the capitals of such countries, standing panels of arbitrators and a standard arbitration clause and rules. It offers a comprehensive system for the settlement of controversies which may arise in trade between nationals of different countries and in the view of its originators will help bring about better business relations.

INDUSTRIAL ARBITRATION

DISPOSITION OF LABOR DISPUTES IN THE TRANSPORTATION INDUSTRY

BY

JOSEPH MAYPER

Member of Law Review Committee

GOVERNMENTAL machinery for the preservation of interstate and foreign commerce by preventing strikes resulting from labor difficulties has been in operation in the railroad industry for many years and in the air transport industry since April 1936, while the Congress now has under consideration similar legislation for the maritime industry.

RAILWAY LABOR ACT

Prior to the enactment of the Railway Labor Act of 1926, Congress passed several laws regulating railroad labor: a railroad arbitration act in 1888, which never functioned; the Erdman Arbitration Act in 1898, which provided, also, for mediation and conciliation; the Newlands Act in 1913, and the Transportation Act of 1920. For one reason or another these acts did not function effectively. The (Watson-Parker) Railway Labor Act of 1926, prescribing a definite procedure for collective bargaining by independent parties free from interference, influence or coercion and setting up machinery for mediation, arbitration and fact-finding, as amended by the Act of June 21, 1934, is now in operation.

The general purposes of the Railway Labor Act of 1926, as amended, are:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Carriers and their employees are required to exert every effort to make and maintain agreements concerning rates of pay, rules, and working conditions and to settle all disputes and to avoid any interruption to commerce. Disputes are to be considered and, if possible, decided, in conference between representatives of both groups, chosen by each group without interference, influence or coercion by the other group. If a dispute arises among a carrier's employees as to who are the duly authorized representatives of such employees, the National Mediation Board, created by the Act, may investigate and, if necessary, take a secret ballot of the employees involved, and certify the individuals or organizations so authorized.

Conference between Parties. In case of dispute arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, the designated representatives, within 10 days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, must specify a time and place at which a conference is to be held. The carrier may not change the rates of pay, rules, or working conditions of its employees as a class, except in the manner prescribed in the agreements or in the Act.

Adjustment Board. A National Railroad Adjustment Board is established, consisting of 36 members selected in equal numbers by the carriers and by the national labor organizations of the employees, and divided into four divisions of railroad employment. Any division may, in its discretion, establish regional adjustment boards for a limited period of time with full authority to act in its place and stead. This Board is authorized, upon the petition of the parties or by either party to the appropriate division, to handle disputes growing out of grievances or the application or interpretation of existing agreements, and its decisions by a majority award of the division are binding, except insofar as they contain a money award. The parties may be heard either in person, by counsel, or by other representatives, and due notice of hearings must be given to all parties. If a division is unable to agree upon an award, such division must select a neutral person as a "referee"; if the division is unable to agree upon a referee, the selection is made by the Mediation Board within 10 days of certification of the deadlock.

In case of an award in favor of the petitioner, the division is required to enter an order making the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled on or before a day named. If the carrier does not comply with the order, the petitioner may bring suit on the order in the appropriate United States District Court as in any civil suit, except that the findings and order of the division are *prima facie* evidence of the facts stated therein and except that the costs are paid out of the Court's appropriations and the petitioner, if successful, may be allowed a reasonable attorney's fee. The District Court is empowered to make such order and enter such judgment as may be appropriate.

Mediation Board. A National Mediation Board is established as an independent agency in the executive branch of the Government, composed of three members appointed by the President, for periods of three years. The services of this Board may be invoked by either party: (a) in a dispute concerning *changes* in rates of pay, rules, or working conditions not adjusted by the parties in conference, and (b) any other dispute not referable to the Adjustment Board and not adjusted in conference between the parties or where conferences are refused. The Board may also proffer its services in case any labor emergency is found by it to exist at any time. In either event, the Board is to attempt, by mediation, to bring the parties to agreement and, if unsuccessful, to induce them to submit their controversy to arbitration. If arbitration is refused by either party, no change may be made in the rates of pay, rules, or working conditions or established practices, in effect prior to the time the dispute arose, for 30 days after the Mediation Board has notified the parties of the failure of its mediatory efforts.

Board of Arbitration. An unsettled controversy may, by agreement of the parties, be submitted to the arbitration of a board of three (or six) persons, but failure or refusal to do so is not construed as a violation of any legal obligation imposed by the Act. The agreement to arbitrate must be in writing, refer to the Act, state the number of arbitrators, carry the properly acknowledged signatures of duly accredited representatives, indicate the specific questions submitted, provide that any of the questions sub-

mitted may be withdrawn at the written request of all the parties, provide for a majority award, fix a period for the commencement of the hearings and for the filing of the award and the period during which the award is to continue in effect, and provide for its faithful execution.

Each party names one arbitrator (or two) and the two (or four) thus chosen name a third within five days after the two meet (or a fifth and sixth within 15 days after the four meet); if the arbitrators chosen by the parties fail to name the other(s), then the Mediation Board does so. The board of arbitration makes all necessary rules for conducting its hearings and the parties may present their evidence in person, by counsel or by other representative. The board of arbitration has power to administer oaths and to require the attendance of witnesses and the production of books and papers through the issuance of subpoenas by the clerk of the District Court.

A certified copy of the award is furnished to the parties and the original, together with the papers, proceedings and a transcript of the evidence, is transmitted to the clerk of the appropriate United States District Court (with copies to the Mediation Board). The Court enters judgment on the award within 10 days after filing, unless a petition to impeach it has been filed within such period on any of the following grounds: that it does not conform to the substantive or procedural requirements of the Act, that it does not conform nor confine itself to the stipulations of the agreement, that an arbitrator was guilty of fraud or corruption, or that a party practiced fraud or corruption which affected the result. The Court is prohibited from issuing any process to compel the performance by an individual employee of labor or service without his consent.

Emergency Board. The President, upon notice from the Mediation Board that a dispute which threatens seriously to interrupt interstate commerce and which it has not been able to adjust under any of the foregoing provisions, may create an emergency board to investigate and report. Such a board may be composed of any number of persons the President deems desirable, must be created separately in each instance, and must report to the President within 30 days from the date of its creation. After the board's creation and for 30 days after it has reported to the President, no change, except by agreement, may be made by the parties in the conditions out of which the dispute arose.

Air Transport Labor Act

The enactment of Title II of the Railway Labor Act of 1926, as amended, on April 10, 1936, extended, with minor changes, all of the provisions of that Act to common carriers by air engaged in interstate or foreign commerce, to every carrier by air transporting mail, and to every air pilot or other person who performs any work as an employee or subordinate official of such carrier.

The jurisdiction of the National Mediation Board established under the Railway Labor Act is extended to cover similar controversies involving airlines. All of the duties, requirements, penalties, benefits and privileges prescribed by the Railway Labor Act apply to air transport, except that the National Mediation Board, whenever it deems it necessary, is empowered to establish a permanent National Air Transport Adjustment Board in place of, but with the same duties as, the National Railroad Adjustment Board. Adjustment boards may, however, be established by agreement between the employees and the carrier on any individual carrier, or system or group of carriers by air, and any class or classes of its or their employees.

Proposed Maritime Labor Act

On March 1, 1937, the Chairman of the House Committee on Merchant Marine and Fisheries (Mr. Bland) introduced a bill—H. R. 5193—to amend the Merchant Marine Act, 1936, by adding thereto a new title providing for the prompt disposition of labor disputes between carriers by water and their employees. Hearings were held on this bill during the last week in May. American shipowners and certain shippers indicated in their testimony their belief that, with certain amendments to meet water-carrier operating conditions as distinguished from railway operations, the enactment of such legislation would prove beneficial to the shipping industry, marine labor and the general public. Seamen's labor unions were divided in their viewpoints, however, one group expressing itself in favor of such legislation in principle and another group opposing it vigorously on the ground that the time was not opportune and that such legislation should be deferred until marine labor was better organized and had had an opportunity to develop effective agreements with ship-operators. The bill was still pending before the House Committee at the time of going to press.

The bill is modeled on the Railway Labor Act and contains generally identical language in many of its provisions, except that it omits certain powers which are now vested in the National Labor Relations Board and, incidentally, provides that the representatives of the parties who are authorized to confer with each other "shall be native-born or fully naturalized citizens of the United States." It applies to carriers

> engaged in the transportation by water of passengers or property on the high seas, or on the Great Lakes, from one port or place in the United States to another port or place in the United States, or between any port or place in the United States and any foreign port, including any operator of a cargo vessel commonly called an "ocean tramp"; (2) any person, firm or corporation engaged in barge or lighterage service in connection with the transportation by water of passengers or property as set forth in clause (1) hereof; and (3) any person, firm, or corporation engaged in stevedoring, trucking, or warehousing of any such property.

The bill defines the term "employee" as including any person in the service of a carrier and

> any person employed in any capacity by such carrier provided the duties assigned to or services rendered by such employee, directly or indirectly, in any manner affect, relate to, or are concerned with the transportation by water of passengers or property as set forth in clause (1) of subsection (a) of this section, or the furnishing of services, labor, equipment, and facilities as respectively set forth in clauses (2) and (3) of subsection (a) of this section, it being the intent that this Act shall apply to those persons whose work is being performed or is customarily performed in relation to the movement of such interstate and foreign commerce and traffic, and that the provisions of this Act are essential and appropriate to secure the freedom of that commerce and traffic from interference or interruption.

The duties and functions of the National Mediation Board created by the Railway Labor Act are extended to water carriers, and Adjustment Boards are provided for with duties generally similar to those devolving on similar boards under the Railway Labor Act. In addition, provision is made for the appointment of boards of arbitration by voluntary agreement of the parties, and for the appointment of Emergency Boards by the President. Procedural and enforcement provisions are generally similar to those provided for in the Railway Labor Act.

These legislative provisions pyramid pacific settlement in the transportation industry, the base being conferences, the next sector being mediation, the third being arbitration and the fourth

inquiry. They start with the individuals, proceed with boards of their own choice, bring in the impartial umpire and finally reach the President. They mark a far outpost in adjustment, mediation and arbitration of labor disputes and their application merits the closest study as a basis for extension of the principles they embody.

NEWS AND NOTES

Advisory Committee. The Editorial Board announces that it is appointing an Advisory Committee on Industrial Arbitration to perform, for this section of THE JOURNAL, functions similar to those of the Law Review Committee for the Arbitration Law Section. This Committee will assist the Editorial Board in planning and developing the Industrial Arbitration Section. Its personnel will be announced in a later issue.

Screen Actors Declare 10 Years' Peace. The Screen Actors' Guild, a California organization, occupying the same relation to screen actors as Actors' Equity Association does to stage players, has entered into an agreement with the motion picture producers covering the terms of employment of actors engaged in the industry. Thirteen of the principal producers in the field have signed the agreement, which became effective May 15, 1937, and will extend over a period of 10 years, during which time the Guild agrees it will not call nor engage in a strike.

The agreement provides that on each April 1, during the life of the contract, a committee appointed by the Guild will meet with a similar committee appointed by the producers, to discuss its modification and submit recommendations for revision. If such recommendations are concurred in by the Guild and the Producers they shall become a part of the contract. If the committees cannot reach an agreement, either may demand arbitration, but upon the following subjects only: minimum salaries for extras, day players, stunt men and stock players; hours of labor for actors receiving $500 a week or under, including actors employed by the day receiving $83.33 per day or under.

Arbitration shall be by a board of three arbitrators, one chosen by the Guild, one by the producers and the third jointly chosen. In default of an agreement upon the third arbitrator, such arbi-

trator shall be chosen by the American Arbitration Association, and a decision of the arbitrators shall be final and the conditions imposed by such arbitration shall become a part of the agreement from such time as the arbitrators determine.

The agreement also establishes an Interpretation Committee, to be appointed by the parties, with a provision for arbitration in the event the committee is unable to agree; and a Joint Conciliation Committee of four members, two to be appointed by each of the parties, to sit within seven days after a matter has been referred to it for conciliation. If the Committee fails in its attempt to conciliate the dispute between actor and producer, it will be submitted to arbitration according to the laws of California, with the arbitrators selected in the manner outlined above.

Columbia Agreement Includes Arbitration. Arbitration under the Rules of the American Arbitration Association is provided for in an agreement entered into on May 27, 1937, by the Columbia Broadcasting System and the American Guild of Radio Announcers and Producers. The agreement runs for a period of five years and covers hours, wages and working conditions for announcers and assistant directors. This agreement is the first of its kind in the radio field.

Court Enters Field of Mediation. Offering his services as mediator in a four-months-old strike, after dismissing charges against a picket brought before him for disorderly conduct, Magistrate Louis B. Brodsky (New York City), was instrumental in bringing to an end a strike which had resulted in 59 arrests during its progress. Upon acceptance of the mediation offer by the attorneys for the Cafeteria Employees' Union and the restaurant involved, a settlement was arrived at in the Magistrate's Chambers providing for reinstatement of the strikers, recognition of the Union, increased wages and a closed shop.

Award to Building Service Employees.[1] Former Justice Frank C. Laughlin, acting as arbitrator under the agreement between Building Service Employees' Union and the Realty Advisory

[1] See ARBITRATION JOURNAL, Vol. 1, No. 2, p. 186, for brief statement; and New York Law Journal (May 13, 1937) for full statement of controversy and decision.

Board on Labor Relations (New York City), announced his award on May 10, 1937, to take effect as of April 20, 1937. The principal features of the award were:

All building service employees get one week vacation with pay.

Apartment-house employees receive an increase in their minimum standards of $4 a month, retroactive as of May 1. Under the new schedule, employees of Class A buildings will receive $102 a month; those in Class B, $92, and in Class C, $82.

Employees in Class A office buildings get no wage increase, but will receive the vacations. Those in Class B get an increase of 75 cents a week, while those in Class C, formerly getting $25 a week, will receive a $1 increase per week.

In addition, building service employees in office and loft buildings are granted the 45-hour week instead of the prevailing 48-hour week.

Employees henceforth will be paid three times a month, instead of twice a month, as heretofore.

New York State Board of Mediation. The Legislature of 1937 authorized the Governor to appoint a State Board of Mediation of five members for the prevention and settlement of labor disputes. The members are: William H. Davis, Chairman; Mabel Leslie, Arthur S. Meyer and Max Meyer, New York City; and John C. Watson, Albany.

The law establishes the policy that the prompt settlement or prevention of labor disputes by amicable methods, regardless of where the merits of the controversy lie, is in the interest of the public and of the State; and that voluntary mediation of such disputes, under the guidance of a governmental agency, will tend to promote permanent industrial peace and the health, safety, welfare and comfort of the people. Upon its own motion, in an existing, imminent or threatened dispute, the Board may act to: (a) arrange a conference; (b) invite disputants to attend and submit their grievances; (c) discuss such grievances or differences, and (d) assist in negotiating and drafting agreements for the adjustment or settlement of the differences.

The Board, or any of its members, may hold private or public hearings, subpoena witnesses and compel their attendance, administer oaths, take testimony and receive evidence. The Board acts as a mediatory body to assist parties in controversy in the settlement of their differences and is not to be confused with

the State Labor Relations Board which is patterned on the Wagner Act.

The State Mediation Board will take over the functions and activities of the City Industrial Relations Board established in April by Mayor La Guardia.

Since its creation, the City Board has successfully disposed of 188 matters involving labor difficulties of all kinds and affecting more than 75,000 workers. Assisting the Board has been a special panel of 150 arbitrators named by the Mayor to represent, in equal numbers, the public, employers and employees.

The 188 cases handled by the Board included 12 complete settlements where agreements were signed by both sides; 85 strikes or threatened strikes adjusted by mediation; 5 strikes settled or averted through elections supervised by the Board; 7 cases settled by arbitration; 37 cases where the continuance of existing difficulties might have resulted in strikes; and 42 cases in which conferences arranged by the Board resulted in adjustment of pending difficulties. Eleven cases remain to be disposed of.

In making public the report of the Board's activities, Mayor La Guardia also announced that Burton A. Zorn, former Executive Director of the Board, will act as liaison officer on labor matters between the City Administration and the State Mediation Board and as "moderator" where strike conditions exist. He will also conduct surveys on labor and living conditions as they affect the City Government. The Labor Panels will be retained by the State Board for use in emergencies where the good offices of its members may prove useful in adjusting difficult situations.

Toledo Peace Board. Toledo (Ohio) had a power workers' strike which set it thinking about economy in labor relations. The result was an ordinance establishing the Toledo Industrial Peace Board, called for short the Peace Board. Established as an emergency body, it now continues to function as part of the city machinery. The Board is a conciliatory body of 18 members, whose duty it is to promote industrial harmony and to assist the municipal government in the maintenance of law and order. It is not an arbitral tribunal, as three-quarters of its work is off the record. It will only help parties to agree upon a third arbitrator and will use its good offices to persuade him to serve.[1]

[1] Copy of Ordinance obtainable from THE ARBITRATION JOURNAL.

Conciliators Begin Work in Indiana. Since April three conciliators have been appointed by the Commissioner of Labor and seven strikes have been settled, the largest one being that of the Indiana Railway Company operating interurban connections to different sections of the state.

Milwaukee Labor Ordinance. The city has supplemented the Wagner Act and the Wisconsin Labor Code with an act of its own which authorizes the Mayor to appoint a committee of nine citizens. An interesting feature of its composition is that three are representatives of employers and three of labor and three must be members of religious denominations. Whenever a controversy arises, such a board is appointed to make advisory findings to the Mayor on: (1) Has the employer refused to meet with representatives of labor for the purpose of collective bargaining; (2) Does such refusal cause the assemblage of 200 or more persons within an area of one-half acre adjacent to the place of business involved, and (3) Does the assemblage constitute a danger to the life, limb and property of the citizens of Milwaukee? Upon these findings, the Mayor issues an order and any employer failing to abide by it is subject to a fine or imprisonment.[1]

Jurisdictional Disputes. Under date of May 27, 1937, the *New York Times*, referring to the war between the American Federation of Labor and the Committee for Industrial Organization, called attention to "the one almost certain thing that can be said of the labor war that lies ahead is that it will bring with it an increase of jurisdictional disputes between rival unions. Little attention has been paid to the possible consequences of this development."

The *Times* then points out that the Wagner Act has nothing specifically to say on the problem of jurisdictional disputes and that the absence of a method of settlement may well constitute a handicap to the forward movement of industry.

That arbitration supplies the missing method is illustrated by the action taken by the Building Trades Department of the American Federation of Labor. When the split in this Department was ended by its reorganization in 1936, the agreement of the two parties provided for a national referee to whom questions

[1] Copy of Ordinance obtainable from THE ARBITRATION JOURNAL.

of jurisdiction could be referred and whose decisions would be final and binding. The Executive Council has recently put into operation a plan for the immediate settlement of such disputes, which provides for local arbitration boards. Under this plan, local building trades councils and employers' associations are called upon to create local arbitration boards composed of an equal number of employers and organized building craft workers. This local board must meet within 24 hours after the meeting is called.

If the dispute has not been settled, a 96-hour period of peace is provided, during which there shall be no strike nor abandonment of work nor refusal to work because of a jurisdictional dispute. After the decision is rendered, should any local union fail, within 24 hours, to abide by and work under any decision, the employer is given the right to fill the places with such men, members of other unions, as in his judgment can perform the work. The plan makes it mandatory upon the craftsmen selected to perform the work. An international union, whose jurisdictional claims or practices are affected by a decision of a local arbitration board on a jurisdictional question, may appeal to a national referee. The local decision is, however, in effect until the matter is acted upon by the national referee.

A further evidence of the use of arbitration is to be found in the agreements entered into between employers and unions. These provide for boards of mediation consisting of an equal number of representatives from the employers and the union. Many of these agreements, however, provide that in the event the mediators cannot agree, the matter is to be submitted to an arbitrator appointed by a neutral, impartial agency. In a number of these agreements, by consent of both unions and employers, the American Arbitration Association has been named to appoint the arbitrator and to conduct the hearings under its rules.

Arbitration Provisions in Labor Agreements. Thousands of labor agreements between employers and employees are being entered into which contain provision for some form of arbitration. When management and labor are in accord that grievances and controversies arising out of such agreements should be pacifically disposed of, care should be exercised to incorporate an appropriate arbitration provision that will maintain the integrity of

the contract and so continue good understanding and peaceful relations. The following standards should be kept in mind as being desirable in such contracts:

1. Does the contract provide that all grievances, claims or controversies arising out of or relating to the agreement, or the alleged breach thereof, or involving the meaning of any of its provisions, or the administration of the practices referred to therein, or the performance of the obligations assumed by the parties, are to be disposed of amicably by the parties through their respective duly authorized representatives?

2. Does it provide that the matter in dispute will be submitted, in the first instance, for possible adjustment by conference between duly authorized representatives of the parties selected in equal numbers?

3. Does it provide that if the conferences are unable to reach a decision, the matter in dispute will be submitted for settlement by arbitration, to a board consisting of one or more arbitrators to be designated by the employer and one or more arbitrators by the association of employees, those so named to choose, by majority vote, an impartial chairman?

4. Does it provide that if a party fails to name an arbitrator or if the full number of arbitrators fail to choose the impartial chairman, within certain specified periods (as five days after the demand for arbitration or after the designation of the arbitrators, as the case may be), that a qualified neutral agency, such as the American Arbitration Association, will make the appointment upon the written request of either party and that the proceeding, if the parties so agree, is then to be conducted under the rules of such a qualified neutral agency?

5. Does it provide for simple rules of procedure so as not to delay the presentation and disposition of the matter in dispute as, for example, that the decision is to be rendered within 10 days after the conclusion of the presentation of evidence, that the decision of a majority of the arbitrators shall be final and binding on the parties, and that any expense incurred in connection with the proceeding and the compensation of the impartial chairman are to be borne equally by the parties?

6. Finally, does the arbitration section of the contract provide, where the prevailing arbitration law makes such arbitration agreements valid, that the proceeding is to be conducted in ac-

cordance therewith and the award is to be filed with the court having jurisdiction over its legal enforcement?

NOTE:—The Rules of the American Arbitration Association are in accord with the arbitration laws and provide for a continuous proceeding, avoiding any delay, and may be adjusted to any type of controversy. By including a provision that the arbitration shall be conducted under these Rules it will be unnecessary to set forth the procedure in the contract.

The standing panels of the Association are available for mutual choice of an arbitrator by the parties. The arbitrators serve without compensation, so as not to have even the interest of a fee in the proceeding.

Arbitration clauses embodying the above standards are in use in existing contracts and are available upon application to the American Arbitration Association.

COURT DECISIONS.

Necessity for Notice and Hearing. Plaintiff, a non-union member of C. Co., sought an injunction against the enforcement of an award rendered by the National Railroad Adjustment Board. The award resulted from a hearing brought at the instigation of the defendants, members of the union, to determine the seniority rights of the plaintiff. Plaintiff was not a party to the proceeding and had received no notice of the hearing which anteceded the award. On appeal from a decree enjoining the enforcement of the award, *held:* The plaintiff can not be bound by an order of an administrative body in a proceeding to which he was not a party and of which he had no notice. To hold him bound under such circumstances would be in violation of the "due process" clause of the Constitution. *Nord* v. *Griffin*, 86 F. (2d) 481 (C.C.A. VII 1936). This case is commented upon in 21 Minnesota Law Review 738, 1937.

Wage Dispute—Distinction between Award and Appraisement in Labor Dispute. This is an action to recover a balance claimed to be due for wages. A dispute had arisen between the upholsterers employed in various manufacturing plants and their employers. An agreement to submit to arbitration was signed by presidents of two labor unions and the Furniture Manufacturers' Association. Upon the signing of this agreement the strike was called off. The agreement contained a clause that all difficulties and disputes should be submitted to the Pacific Northwest Regional Labor Board and that the decision of this Board was to be retroactive to the date of return to work. An award was rendered on March 6, 1935, which was then repudiated by the manufacturers on the ground that the arbitration proceeding was invalid under the Arbitration Law of Washington and that, in any event, the award was belatedly rendered. In the present suit instituted to recover the difference between the wages actually paid and the wages fixed in the award, it was held that the "arbitration" is not an arbitration properly so-called but is in the nature of an appraisement; consequently, the "appraisement" is binding and valid despite the fact that the proceeding did not conform to the arbitration statute. The statute is wholly inappli-

cable to the adjustment of a labor dispute between employer and employees. *Gord* v. *F. S. Harmon & Co.*, 61 Pac. (2d) 1294 (S. Ct., Wash. 1936). As to the distinction between award and appraisement *cf.* Kupfer & Danziger, "*Appraisals under Arbitration Laws*" 1 Arbitration Journal 1, 92 *seq.* (1937).

What Constitutes a "Labor Dispute". In a contract of employment whereby the plaintiff, as sales manager or general manager, agreed to devote his time and attention exclusively to the development and extension of the corporation's business for a period of three years, at a salary of $100 per week, it was *held:* not to be a contract pertaining to "labor" within the act providing that statutes with reference to arbitration shall not apply to contracts pertaining to labor, and hence the arbitration award made pursuant to a contract between parties was binding on the employer. The failure to have the arbitration award confirmed prior to commencing action to recover thereon was *held:* not to preclude such action where complaint was filed within three months after making of award and requested affirmance of award. *Kerr* v. *Nelson*, 59 P. (2d) 821, (California).

Submission to Arbitration Does Not Constitute Waiver of Equitable Relief. This was an action brought by an employer against employees and officers and members of employees' union to restrain the defendants from carrying on a strike and other acts complained of as alleged conspiracy to injure or destroy plaintiff's business, goodwill and property. One of the acts asked to be enjoined was an alleged seizure of the plaintiff's property in a so-called "sit-down" strike. In the employment agreement, it was expressly agreed that there would be no stoppage of work and that strikes, walk-outs, lock-outs, etc. should be arbitrated. An arbitration hearing took place, but the defendants went on strike and refused to accept the award. The defendants now argue that the arbitration and award constituted a waiver and an abandonment of the action, so that the present action to restrain the "sit-down" strike cannot be brought. The Court held that the arbitration hearing and the award rendered under the agreement do not constitute an abandonment of the right to go before the equity court and the defendants' motion is denied and the case placed on the calendar for trial. *Champion Shoe Mfg. Corp.* v. *Boot & Shoe Workers Union, Local No. 693*, N. Y. L. J. March 19, 1937, Sup. Ct., Spec. Term, Pt. III, Hammer J.

BOOK REVIEWS AND NOTES

The Mexican Claims Commissions 1923-1934. A Study in the Law and Procedure of International Tribunals. By A. H. Feller. The Macmillan Company, New York, 1935.

The purpose of this work is set forth in the first sentences of the author's preface: "The realm of the procedure of International Tribunals is the Antarctica of international law. Not until its little known territory has been conquered will it be possible for some future scholar to draw a complete map of the entire continent." Mr. Feller considers the work of the Mexican Claims Commissions as "a model, in miniature, of the continent as a whole".

It may be recalled that Mexico, between 1920 and 1930, had to undergo a series of revolutions. Ten persons claimed to be president and to have formed a government. It goes without saying that the revolutionary troubles caused heavy loss to foreign individuals and enterprises.

Seven International Commissions were appointed during the period of 1923-1934 in order to settle claims of foreign countries in behalf of their subjects against the Mexican government or vice versa. Two Commissions weighed the controversies between Mexico and the United States and five further Commissions the controversies between Mexico and other countries. The Commissions were organized in the following manner: Each government concerned appointed one Commissioner. These latter were to elect a presiding Commissioner; in default of agreement the President of the Permanent Court at the Hague was to make the appointment. Mr. Feller's book offers in its first 315 pages an exhaustive picture of the work of these Commissions. Pages 321-543 contain the text of the International Agreements setting forth the different Commissions. A list of cases is given in pages 549-553. Very extensive material is to be found in the book and the discriminating remarks of the author will provide a very valuable source of information for anyone concerned with the procedure of International Tribunals.

It is of special interest to realize how Commissioners trained under the widely diverging principles of Common Law and Civil

Law cooperated. An example may illustrate the situation: European laws mostly admit secondary evidence but refuse to hear the parties as witnesses, while under American and English law the parties may be heard as witnesses and secondary evidence is admissible only when primary evidence is unavailable. The Commissions acted quite liberally in the admission of evidence, although all Commissions, with the exception of the American, disallowed claims based only on the uncorroborated evidence of the claimant.

It is true that Mr. Feller does not consider the work of the Commissions, on the whole, successful; but he rightly thinks that it is very instructive for drawing up rules of procedure in future international agreements. He believes that it is " a grave mistake to construct a tribunal out of two national members and one neutral member. Few men are capable of holding the balance between two contending national Commissioners ". Agreements to be entered into in the future should provide for two national Commissioners with a neutral umpire in case of disagreement, or preferably for three neutral Commissioners.—HERMAN G. BROCK.

The Romance of Lloyd's. By Commander Frank Worsley and Captain Glyn Griffith. Hillman-Curl, Inc., New York.

This book is interesting to the general reader who does not wish to be burdened by technicalities but is content with a panorama that covers insurance through the ages, sea risks before Lloyd's, London before Lloyd's, merchant adventurers, the old coffee houses, famous men who developed Lloyd's to its present important state, its activities in war time and a description of some famous wrecks and collisions and of some amazing swindles.

It describes what was possibly the first use of arbitration in marine insurance (p. 37). But it contains an element of disillusion, for it destroys the thrills about Captain Kidd and shows him to have been a respectable Britisher interested in hunting down pirates. For this disillusionment, the youth of tomorrow will not bless the authors; but perhaps they will not see the Romance of Lloyd's and will still dig in seashore sands for treasure that is reputed to have been buried.—SYLVAN GOTSHAL.

Industrial Relations in Urban Transportation. By Emerson P. Schmidt. The University of Minnesota Press, Minneapolis, 1937. 264 pp.

This book is the story of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America. However, in order to tell that story, the author found it necessary to devote about 100 pages to the urban transportation industry as such. He presents a most interesting background of the technological, financial and regulatory aspects of the industry. The growth and activities of organized labor fill the remaining 150 pages.

Urban transportation has an ample record of labor controversy. Large numbers of strikes have resulted out of the union-recognition issue. Others have resulted from situations where employers refused to arbitrate. But the industry is one in which a stoppage quickly arouses public feeling. As a result of this condition, the union policy has steadily supported arbitration. In fact, the union is obliged by its constitution to offer arbitration to the employer where other means of settlement have failed, which means the usual negotiations. In a few cities, arbitration provisions are even included in franchises. Because of its long standing, the arbitration procedure has become thoroughly established, and both sides have developed skill akin to lawyers in court, in presenting and handling their cases.

From time to time, there has been dissatisfaction among union members with the arbitration process, particularly when a run of decisions have not been favorable. Many of these instances have been cases where the fault was that the area to be arbitrated was not clearly defined. But the author concludes that "the outcome of a single arbitration case pales in significance beside the effect of arbitration as a working principle, making as it does for industrial peace and continuity of public utility service" (p. 207).

It should be added that the book concerns itself with industrial relations viewed from the union side, and does not pretend to shed light on the employer point of view.—WILLARD L. THORP.

Separation Agreements and Ante-Nuptial Contracts. By Alexander Lindey. Matthew Bender & Company, Inc., New York, 1937.

This volume is offered to fulfil the need for a treatise dealing solely with the law of separation by contract and to provide a

manual containing a variety of separation agreements and incidental forms. Section 21 deals with arbitration and contains various forms of arbitration provisions for incorporation in separation agreements. This section also includes comments on the advantages of one type of provision over another and annotations summarizing important features of the law of arbitration.

Perhaps the most serious difficulty encountered by counsel in matrimonial matters is that the clients approach the problem in an emotional condition, and very seldom are able to think dispassionately. Thus, issues frequently arise in the negotiation and preparation of separation agreements on which neither husband nor wife is willing to compromise because the question has been complicated by emotional factors. In such situations, arbitration provisions are often particularly helpful. When negotiations are deadlocked on some problem which does not arise until the future, it is frequently possible to solve the difficulty by leaving the problem to arbitration. This serves to pass the point for the time being and enables an agreement to be reached on other matters. Frequently the point will never become of practical importance, and even if the issue arises later, often the emotional state of the parties has changed by that time and they are able to reach an agreement without difficulty.

Provisions for arbitration also serve another important purpose in helping to avoid the undesirable publicity that is caused by a resort to court litigation. Such publicity is harmful to all, and particularly to the children. Yet the parents may feel so strongly about the issue, particularly if it concerns the welfare of the children, that they are unwilling to make any compromise about it. If the separation agreement provides for arbitration, this will afford a forum in which the dispute may be litigated and yet which will not involve publicity.

The forms of arbitration provisions which are suggested offer standard workable mechanics and vary somewhat in the emphasis and detail given to particular points in the arbitration machinery. The comments are helpful in giving perspective to the problem of using arbitration provisions, and the annotations which deal largely with the Arbitration Law of the State of New York seem adequate, although summary in treatment.—JAMES W. HUSTED, JR.

NOTES

Kime's International Law Directory. The Directory for 1937 contains a section on International Commercial Arbitration by R. S. Fraser, Chairman, Rules Committee of the London Court of Arbitration, in which are discussed such matters as the indiscriminate signing of contract forms, the meaning attached to arbitration, status of arbitrator, arbitrators not conciliators, arbitrators not valuers; form of arbitration clause; limit of reference to arbitration; taxation or assessments of costs of arbitrators; ratification of the Geneva Protocol of 1923, and of the Geneva Convention of 1927; English law of arbitration; continental law of arbitration; history and future of international commercial arbitration; and arbitration in and among American Republics.

Compulsory Arbitration. The Bulletin of the National Industrial Conference Board under date of May 4 contains a section on compulsory arbitration, describing the Australian and New Zealand conciliation and arbitration laws and experience; together with an account of the Kansas Court of Industrial Relations' experiment and the French Law. The conclusion appears to be that compulsory arbitration has not eliminated strikes and lock-outs.

Periodical Literature. AMERICAN DYESTUFF REPORTER, Vol. 26, No. 6, March 22, 1937, *Is Litigation Necessary?* (pp. 169-70); AMERICAN ROOFER AND MODERN ROOFING, Vol. 27, No. 3. March 1937, *Court-Proofing Roofing Contracts* (pp. 33, 35-6); THE CALIFORNIAN, Vol. 4, No. 4, Spring 1937, *The Heritage of Arbitration*, Moses H. Grossman (pp. 23-31); COLUMBIA LAW REVIEW, Vol. 37, January 1937, *Agreement to Arbitrate a Waiver of Remedies Therefor in Court of Law* (pp. 122-3); DISTRIBUTION AND WAREHOUSING, Vol. 35, No. 12, December 1936, *Disputes Can be Settled without Resort to Courts*, Lucius R. Eastman (p. 10); EASTERN UNDERWRITER, Vol. 38, January 29, 1937, *Success of Arbitration Plan to Solve Subrogation Differences; Abstracts*, J. A. Beha (p. 36) (also in NATIONAL UNDERWRITER, Vol. 41, January 28, 1937, p.38); EASTERN UNDERWRITER, Vol. 38, February 5, 1937, *Greater Use of Arbitration in Insurance Losses*, Louis H. Pink (p. 1); ECONOMIC SURVEY, April 1937, *Activities of the Maritime Arbitration Commission (Russia)*, P. P. Vinogradov (pp. 1-4); GEORGETOWN LAW JOURNAL, Vol. 25, January 1937, *Effect of the United States Arbitration Act* (pp. 443-8); MID-WEST CONTRACTOR, Vol. 71, May 19, 1937, *Arbitration Provisions Expanded in Recent A. I. A. Standard Documents* (p. 3).—Frances L. Van Schaick.

BOOKS RECEIVED *

Collective Bargaining. By R. D. Bundy, Industrial Coordinator of the Board of Education, City of Cleveland. The What and Why of a New Industrial Relationship.

Business Ethics. By Frank Chapman Sharp and Philip G. Fox. D. Appleton-Century Co., New York.

Force or Reason. By Hans Kohn, Professor of History, Smith College. Harvard University Press, Cambridge, Mass. Based upon a series of three lectures delivered in July, 1936, at the Summer School of Harvard University under the title " Three Fundamental Issues of the Twentieth Century ".

N. R. A. Economic Planning. By Charles Frederick Roos. The Principia Press, Bloomington, Ind.

The Science of Social Adjustment. By Sir Josiah Stamp. Macmillan & Co., Ltd., London. A collection of studies in the relations between Science and Society.

* The inclusion of a book under this heading does not preclude a later review.